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Code of Civil Procedure (Act V of) 1908, ss. 2(2), 47 and O. 21, r. 84—Order setting aside auction sale as a nullity for default of deposit—Whether appealable.

An order by the executing court setting aside an auction sale as a nullity by reason of any violation of O. 21, r. 84 of the Code of Civil Procedure or other mandatory provision amounts to a final order determining the rights of the parties falling thereby within the definition of 'decree' under s. 2(2) read with s. 47 of the Code and is appealable as such.

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—s. 105, O. 43, r. 1, Remand—Finality of finding or direction in the order of,—Scope—Mode of calculation of profits of mortgaged property not laid down in order of remand—Determination according to principle laid down in a case in existence but not cited at the stage of remand order—Permissibility of.

The consistent view of all the High Courts in India is that any finding, decision or direction expressly recorded or implicit in the order of remand is final and cannot be re-opened in that proceeding in the same or any other Court. Points against the remand order which could be but were not raised stand on the same footing. That would not, however, apply to such points in support of the order of remand.

Accordingly, where the case is remanded by the High Court made in the remand order, the question whether certain mortgages for determining afresh according to law and the observations stood fully paid up at a particular point of time but except for comments nothing was laid down as to how the profits to be credited towards the mortgages were to be determined, it is open to the Court below to calculate the same according *inter alia* to the principle laid down in a case precedent on the point which was in existence but not cited at the time the remand order was passed.

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Constitution of India, (1950), Art. 226—Period for filing Writ petition.

The rule in *Mongey's* case (Writ petitions should be filed as quickly as possible and unless there be, to the satisfaction of the Court, special circumstances requiring extension, within 90 days which is the period fixed for preferring appeals to the High Court) is at best a rule of practice and not a rule of limitation and cannot, therefore, be applied rigidly in cases where there is nothing to show laches or undue delay on the part of the petitioner.

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Government of India Act, 1935, ss. 59 and 240—Order of dismissal from Chief Secretary not expressed to be in the name of the Governor though authenticated—Validity of the order—If can be proved to be really in the name of the Governor—Appointment by the Governor—Dismissal, if could be ordered by Premier after Independence—Power of, if could be delegated—Effect of Independence Act on non-covenanted services—Secretariat instructions under s. 59, Government of India Act, if can affect the provisions of s. 240(2) of the Act.

Enquiry—Enquiry against Government servant—Enquiring Officer not shown to be appointed by punishing authority—Effect on enquiry—Opportunity to show-cause—Several charges—Omission to supply copy of the charge on which dismissal ordered—Opportunity to cross-examine—Volunteered statement of witness—Made use of, if denial of opportunity—Opportunity given at second stage not availed of—Omission of opportunity at first stage—Effect.

Salary—Calculation of—Crossing of efficiency bar and increments, if to be considered—

Evidence—Official documents not formally produced—No privilege claimed—Party producing, if can refuse to file—Court, if can look into it.

Admission—*Plaint allegation not denied in written statement*
—*If to be deemed admitted—Civil Procedure Code, 1908, O. VIII, r. 5.*

Where an order of dismissal emanating from the Chief Secretary is not expressed to be in the name of the Governor can be proved to be made by the Governor as the question relates to the substance of the order and not only to its form. Such an order, though authenticated would not be valid if not expressed to be in the name of the Governor.

Delegation of authority to appoint and consequently to dismiss to subordinate authority though is not illegal, but where actually the appointment was made by the Governor, then in spite of subsequent delegation of the power of appointment and dismissal, the power to dismiss rested with the Governor. The object of s. 240(2) of the Government of India Act cannot be allowed to be defeated by recourse to such delegation of power. Such a delegation of power to dismiss an employee appointed by higher authority is repugnant to s. 240(2) and is, therefore, unconstitutional. Consequently, where an appointment was made by the Governor, the Premier on subsequent delegation of power cannot order the dismissal. Rule framed under s. 59 of the Act cannot be violative of s. 240(2) of the Act.

Where it has not been shown that enquiring officer was appointed by the punishing authority or under his authority, or that the charges were framed by competent authority or under his authority or that the suspension order was passed by competent authority or notices were issued by him, the enquiry would be vitiated.

The failure to give copy of the findings on the charge on which the dismissal was made is denial of opportunity. So also where the employee was not allowed to cross-examine a witness on his volunteered statement relied on by the enquiry officer.

Where an enquiry is invalid on the ground of failure to prove that competent authority took the various steps leading up to the order of dismissal the nature of the infirmities in the enquiry and the order of dismissal go to the root of the matter and cannot be deemed to have been waived by an omission to show cause at the second stage.

Allegations made in the plaint where not denied shall be deemed to have been admitted under O. VIII, r. 5, C. P. C.

The only contingency under a document may not be produced in Court is the one relating to privileged documents. In the absence of any claim to privilege no party could say that such document would not be filed in court. The use of such document by the Court is improper.

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Hindu Marriage Act, (25 of) 1955, ss. 10(1)(b) and (f), 13(viii) and 15—*Hindu Marriage (U. P. Sanshodhan Adhiniyam) (XIII of) 1962, s. 13(viii)—Decree of divorce on the ground of exceptional hardship or depravity in the absence of any decree for judicial separation—Whether valid—Cohabitation after knowledge of adultery—Whether constitutes condonation so as to defeat claim for judicial separation—Remarriage after decree of divorce during pendency of petition for leave to appeal in Supreme Court—Whether a bar to grant or ground for revocation of leave to appeal.*

Sub-cl. (viii) of s. 13(1) of the Hindu Marriage Act as amended in its application to U. P. comes into operation after a decree for judicial separation and may be availed of only when after such a decree either of the two conditions (a) or (b) of that sub-clause is fulfilled. No decree of divorce can be passed simply on the fulfilment of condition (b) without there being in existence a decree for judicial separation.

Cohabitation with the wife even after the knowledge that she had been guilty of cohabitation with another person would be sufficient to constitute condonation within the meaning and for purposes of s. 10(1)(b) of the Hindu Marriage Act so as to disentitle the husband to a decree for judicial separation.

Even though s. 15 of the Act aforesaid (allowing parties to remarry if there is no right of appeal etc.) may not apply in terms or render unlawful a remarriage in view of the fact that no appeal as of right lay to the Supreme Court, it is none the less necessary for the parties to make sure before remarriage that no special leave petition has been filed or pending in the Supreme Court and one could not by remarriage immediately after the High Court's decree deprive the other of the chance to present or prosecute appeal to Supreme Court.

Smt. Chandra Mohini Srivastava v. Avinash Prasad
 Srivastava and another

Land Acquisition Act, (I of) 1894, ss. 23 and 28—*Market value of land acquired—How ascertained—Award of interest—ambit of discretion in grant of—Point of law not specifically raised in cross-objection—Permissibility of.*

Market value on the basis of which compensation is payable under s. 23 of the Land Acquisition Act means the price which a willing purchaser would pay to a willing seller for a property having due regard to its existing condition, with all the advantages, and its potential possibilities when laid down in its most advantageous manner, excluding any advantage due to the carrying out of the scheme for the purposes for which the property is compulsorily acquired.

The evidence of an offer from an intending purchaser cannot be equated in importance with the evidence of proper specimen

sales of properties in the neighbourhood, it is nonetheless relevant as evidence of one's opinion about the value of the property and if made *bona fide* and without compulsion or special circumstances for the proposed purchase, ought to be accepted in preference to the annual crop value which is not always an adequate method of valuation.

The grant of interest under s. 28 of the Act is discretionary but once the discretion to grant interest is exercised there is no further discretion in the matter of rate of interest which, as provided, must be at the rate of 6 per cent per annum.

Where a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interest of justice to entertain the plea. The High Court may, therefore, go into the question of the necessary rate of interest although the same has not been specifically raised in the cross-objection.

Raghubans Narain Singh v. The U. P. Government through Collector of Bijnor

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Representation of the People Act, (43 of) 1951, ss. 82(b), 90(3) and 123(2)—Corrupt Practice—Threat of force by a candidate after withdrawal against an elector in support of contesting candidate—Whether amounts to,—Non-joinder of such candidate, in election petition—Effect of.

The threat of force extended by R (after withdrawal of candidature) to an elector in the event of his not voting or canvassing support for a contesting candidate amounts to an allegation of corrupt practice against R and in view of his being included in the expression 'any candidate' under s. 82(b) of the Act, the election petition without impleading him (R) as one of the respondents would be defective and liable to dismissal under s. 90(3) of the Act.

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U. P. (Temporary) Control of Rent and Eviction Act, (III of) 1947, s. 3(1)(c)—Alteration material but not likely to diminish value—Whether sufficient to sustain suit for eviction.

In order to maintain a suit for eviction under s. 3(1)(c) of the Control of Rent and Eviction Act, it is enough to establish unauthorised construction by the tenant which has materially altered the accommodation, i.e. is one which has materially or substantially changed the front or the structure of the premises. If so, it need not be proved further that the same is likely substantially to diminish the value of the accommodation which is the alternative ground for a suit under cl. (c).

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(Per J. SAHAI, J. and PATHAK, J.; G. C. MATHUR, J. *contra*):—
The powers of punishment of the Vice-Chancellor must be judged in the setting of s. 6 of the Act. The Vice-Chancellor cannot remove a student from the roll only on his subjective opinion. Under cl. 22 of the Statutes he has to consult the Dean of the Student Welfare while cl. 8 and 31(a) provides for assistance to be rendered to the Vice-Chancellor by the Dean and the Proctor which the Vice-Chancellor may require in the exercise of his disciplinary authority.

An investigation being implied and there being an express provision for consultation, it is implicit that the student should be heard before action is taken against him for otherwise the investigation will be a farce and the consultation a mockery of the provision.

In the process of deciding whether or not to punish a student, or the nature of the punishment, the Vice-Chancellor cannot avoid objective determination of certain facts. He may be called upon to consider misconducts of serious nature having serious consequences. The imperative provision for consultation with the Dean and the provision for assistance by the Dean and the Proctor clearly shows that some sort of investigation is contemplated and is implied and that the student concerned should be heard before any action is taken against him. Consequently the Vice-Chancellor is required to act judicially.

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Constitution of India, Art. 226—Power of High Court—If restricted by Acts of Parliament or State Legislature—Right to get elected—Nature—Remedy of an election petition under U. P. Town Area Committee Act—If limits the power under Art. 226.—Cases where a person is declared elected and his election is challenged and where the election result has not been clearly declared—Distinction—Remedy—Office, when can be said to be full—U. P. Town Areas Art. II of 1914, s. 6-J(2) and Form 17 under it.

It is well settled that the powers of the High Court under Art. 226 of the Constitution cannot be restricted by a provision contained in an Act of Parliament or of State legislation. Consequently even though as a practice and in order to respect legislative direction that an election shall not be challenged except by means of an election petition there is no insurmountable hurdle in the way of the High Court in granting relief in a suitable and hard case.

Besides, there is a difference between a case where a person has been declared elected and his election is challenged and where the result of the election has not been clearly declared. In the former case the remedy is by election petition in the latter case it will be by a writ of *mandamus*, directing the Returning Officer to declare the result clearly and in proper manner. Where Form 17 is highly equivocal and contradictory it cannot be said that the result was clearly declared and that being so remedy under sub-s. (2) of s. 6-J could not be availed of by either party.

Where a candidate declared elected did not participate in any of the meetings of the Committee, nor assert his right, it could not be said that the office was full.

Hira v. Chetu

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—**Art. 311(2) Civil Services Regulations (as amended by U. P. Government) Art. 265-A—Compulsory retirement showing on its face the ground that the servant has outlived his utility—Order of, passed without following procedure prescribed under Art. 311(1)—Whether valid.**

An order of compulsory retirement involving, like dismissal or removal, the loss of benefit already earned—showing on its face the reason that the Government servant has 'outlived his utility' casts on him a stigma and is therefore punitive. If, as is admittedly the position in this case, the order is passed without following the procedure prescribed by Art. 311(2) of the Constitution, it would be illegal and liable to be quashed.

The State of U. P. v. Madan Mohan Nagar ...

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Contempt of Court—Compromise between parties—'Undertaking' by one party accepted by another—Undertaking if given to the court—Court recording it and passing decree on its basis—Meaning of the word 'Undertaking'—Breach of—liability for contempt.

Where in a case the parties compromised which was recorded by the court as follows: "The learned counsel for the respondent has agreed not to execute the decree for a period of five months if the appellant undertook to vacate the premises within that period. The appellant has given an undertaking to that effect" and the appeal was dismissed with costs on its basis, it was;

Held, that the undertaking was not given to the court and therefore its non-compliance cannot be contempt.

Held, further, that the word 'undertaking' has to be construed in its ordinary meaning.

Amar Chand Kapoor, Advocate *v.* Roshan Lal and another

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Indian Evidence Act, 1872, ss. 17, 31 and 115—Admission—
Admission on a point of law—If binding—Paragraph in an affidavit setting out facts and legal consequences therefrom admitted by the other side—If would operate as an estoppel on the point of legal consequences.

It is well settled that "admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel within the meaning of s. 115, Indian Evidence Act". Admissions are not conclusive unless they operate as an estoppel. A party can never be held bound by an admission on a point of law and it is open to him to explain that it was erroneous and by inadvertance.

Held, that admission of a paragraph of an affidavit containing a point of law did not operate as an estoppel.

The Income Tax Officer *v.* Shambhoo Dayal Om Prakash

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Indian Railways Act, IX of 1890, s. 77—Delivery taken by wrong person on forged receipt and pledged with another—Right of the Railway to file suit for recovery of goods—Bona fides of the pledgee—If affects the right of the Railway.

The position of the Railway as public carrier is that of a bailee. A bailee is competent to file a suit for recovery of the goods fraudulently or forcibly taken out of his possession by persons without title. Where after the wrongful deprivation of possession of the bailee, the goods are pledged, the fact that the pledgee acted in good faith and paid consideration cannot defeat the right of the bailee to recover the goods.

The dictum, "wherever of the two innocent persons must suffer by the acts of the third, he who has enabled such third person to occasion the loss must sustain it", *held* did not apply as on the circumstances of the case the negligence of the railway was not the proximate result of the pledgee accepting to advance money.

Purshottam Dass Banarsi Das *v.* Union of India
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Payment of Wages Act, 1936, ss. 15(2)(3) and 17—*Order admitting an application under the second proviso to s. 15(2) after prescribed period—Propriety of, can be raised in appeal by the employer against direction under s. 15(3).*

From the mere fact that an intermediate order is not itself subject to appeal, it does not follow that there is a finality about it and it enjoys immunity although the ultimate order is appealable. The power to interfere with the former order is inherent in the power to hear appeal.

Held, that the propriety of an order of the Authority admitting an application under the second proviso to s. 15(2) of the Act after the prescribed period of six months can be challenged in an appeal brought by the employer against a direction made under s. 15(3) of the Act.

Divisional Superintendent, Northern Railway, Allahabad *v.* Hukum Chand Jain ...

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Security Deposit—*Whether a trust or simply a debt—How decided.*

The answer to the question whether a security deposit is impressed with a trust or amounts simply to a debt rests on the terms of the agreement and the facts and circumstances including the conduct of parties in each case without leaning one way or the other on account of the fact that the money was paid as a security deposit.

Absence of any provision for segregation of the security deposit and the stipulation for payment of interest thereon and of its being treated at par with commission would, as in this case, negative the claim of there being a trust and as such of a preferential payment with the result that it will rank as an ordinary debt in the event of the debtor company going into liquidation.

Rai Bahadur Seth Jessa Ram Fatehchand *v.* Om Narain Tankha and another ...

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In relation to the prosecution of any person appearing before a Court as a witness for giving false evidence or fabricating false evidence, s. 479-A engrafts an exception to s. 476. Criminal Procedure Code. Subs-s. (6) of s. 479-A makes it clear that the provisions of that section alone are applicable and not the provisions of ss. 476 to 479 for the prosecution of a witness who has given or fabricated false evidence. When no action for offences

punishable under s. 193 and s. 218, I. P. C. has been taken in accordance with the provisions of s. 479-A of the Code it is not open to have recourse to the provisions of s. 476 of the Code, to do so would be to go against the provisions of sub-s. (6) of s. 479-A. The provision of s. 476 of the Code are still available against witnesses whose cases cannot be brought under s. 479-A.

The act of intentionally giving false evidence in any stage of judicial proceeding and the act of fabricating false evidence for the purpose of being used in any stage of a judicial proceeding, fall exclusively within the purview of s. 479-A of the Criminal Procedure Code.

For offences under s. 471, I. P. C. action could certainly be taken under s. 476. Criminal Procedure Code as that offence has been specifically mentioned in s. 195(1)(c), Criminal Procedure Code. Section 195 (i)(c) Criminal Procedure Code also includes any offence described in s. 463 of the I. P. C. It falls under Chap. XXIII, which refers to offences relating to documents, etc., s. 463 defines forgery. S. 466 prescribes punishment for forgery of record of Court or of the public register, etc. Hence a complaint on charges under s. 466 and s. 471, I. P. C. could be filed under s. 476 of the Criminal Procedure Code. These offences are not covered by sub-s. (1) of s. 479-A of the Criminal Procedure Code.

The three essentials of the offence under s. 218 enumerated.

Dr. Krishna Nand Gupta *v.* The State of U. P.
through Deputy Registrar, High Court of Judicature at
Allahabad (Lucknow Bench), Lucknow

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Income-tax Act, (XI of) 1922, s. 10(2)(XV)—Salary bona fide paid to Karta of the Hindu undivided family for looking after family's business—Whether a permissible deduction as expenditure.

If a remuneration is paid to the Karta of the Hindu undivided family under a valid agreement which is *bona fide* and in the interest of the business of the family and the payment is genuine and not excessive, it would be an expenditure laid out wholly and exclusively for the purpose of the business and must be allowed as an expenditure under s. 10(2)(xv) of the Income Tax Act.

Messrs. Jugal Kishore Baldeo Sahai *v.* The Commissioner of Income-tax, U. P., Lucknow

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Indian Forest Act, 1927, ss. 18(4) and 16(5) of Act XXIII of 1965—Appellate orders under s. 17—Revision to State Government under s. 18(4)—Revision lay under s. 22 and not under s. 18(4) of the Act.

If the revisional powers, against the decision of Deputy Commissioner under s. 17 of the Act, could at all be exercised by the

State Government, it could be under s. 22 of the Act and not under s. 18(4) of the Act.

S. 16(5) of the Indian Forest Act (Uttar Pradesh Amendment) (U. P. Act No. XXIII of 1956) do not apply in the present case because the revision purporting to be made under sub-s. (4) of s. 18 of the Act were made more than five years prior to the commencement of the amending Act of 1965.

Harbans Narain and another v. State of Uttar Pradesh and another

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Land Acquisition Act, (I of) 1894, ss. 4, 5-A, 6 and 17—Mirzapur Stone Mahal Act (U. P. Act V of) 1886, s. 5—Regulation VIII of 1793—Acquisition by Government of 'waste' and 'arable' land—Validity of,—Scope of Court's power in,—Ownership or grant of land—Whether and when includes rights over minerals—Grant of Agori Raj—Whether included quarries, etc.

It is manifest that the declaration made by the State Government through a notification under s. 6(1) of the Land Acquisition Act that the land was required for a 'public purpose' is made conclusive by sub-s. (3) of s. 6 and it is, therefore, not open to a Court to go behind it and try to satisfy itself whether in fact the acquisition is for a public purpose. The only exception where it is otherwise and the declaration is open to challenge at the instance of the aggrieved party are cases of a colourable exercise of power e.g. where what the Government is satisfied about is not a public purpose but a private purpose or of no purpose at all.

It is well established that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact, the High Court, in a proceeding for a Writ of *certiorari*, is entitled, upon its independent judgment, to determine whether or not that finding is correct.

Where, as in this case, the land sought to be acquired is not 'waste' or 'arable' land within the meaning of sub-s. (1) or (4) of s. 17 of the Land Acquisition Act, all the proceedings and notifications for the acquisition of land on the assumption to the contrary would be *ultra vires* and illegal and liable to be quashed. It is true that the determination of the nature of the land depends upon and is ordinarily left to the subjective satisfaction of the State Government, it can nonetheless be challenged as *ultra vires* in a Court of law if it would be shown that the State Government never applied its mind to the matter or its action is *mala fide* and such inference may legitimately be drawn in a case where the land is not actually 'waste' or 'arable'.

Prima facie the owner of the surface of land is entitled *de jure* to every thing within or beneath the land and in the absence of any reservation, express or implied, in the grant or transfer,

the mines, quarries and minerals necessarily pass or are acquired with the surface. There being nothing to warrant such reservation in the Sanads or grant to the Raja of Agori, the sub-soil and mineral rights in the estate equally vested in and belonged to the Raja. Mirzapur Stone Mahal Act was meant only for regulating the quarrying of the building stone and there is nothing in that Act or the rules framed thereunder to affect the right of the proprietor to the sub-soil minerals.

Raja Anand Brahma Shah *v.* The State of Uttar Pradesh and others

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Motor Vehicles Act, (1939), ss. 57(8) and 64(a) and (b)—Order under s. 57(8) by R. T. A. varying the conditions of a permit—Appeal lies to prescribed authority under s. 64(b) and not under s. 64(a).

An order passed by the Regional Transport Authority under s. 57(8) of the Motor Vehicles Act, 1939 is appealable to prescribed authority only under s. 64(b) and not under s. 64(a). S. 57(8) deals with an application to R. T. A. to vary the conditions of a permit. If an order is made varying the conditions of a permit, an appeal would lie under s. 64(b) which specifically provides for appeals against orders passed under s. 57(8) but if an order do not vary any of the conditions of the permit cl. (b) of s. 64 would not apply and no appeal under that provision would lie.

An application under s. 57(8) cannot be deemed to be an application for the grant of a permit so as to attract s. 64(a) firstly because s. 64(b) specifically provides for appeal against the order passed under s. 57(8), secondly the exercise of power under s. 57(8) is only to vary the conditions of the permit and not to attach conditions to the permit, and the language used in s. 57(8) requiring an application to be treated as an application for the grant of a new permit is procedural only.

Bhan Singh *v.* The Regional Transport Authority, Meerut Region, Meerut and others

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Payment of Wages Act, 1936, s. 17—District Court hearing appeal—Status of—Whether a persona designata or a civil court—Whether sub-ordinate to the High Court.

Where power is given to an established court, whether it was to be exercised as *persona designata* or as a court, the criterion to determine is whether it was conferred on the Judge as an individual or in his capacity as a court;

Held, the District Court hearing an appeal under s. 17 of the Payment of Wages Act acts as a civil court subordinate to the High Court and not as *persona designata*.

The General Manager, North Eastern Railway and others *v.* Paras Nath Tewari

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Succession Act, 1925, s. 82—Will—Construction of—Hindu Succession Act, 1956, s. 14(2)—Decree—Meaning of—Trial Court granted a declaration that the widow held house No. 2 for her life as a Hindu Widow—Appeal against—During the pendency of the appeal the Hindu Succession Act, 1956 came into force—Upheld that widow became an absolute owner of House No. 2—Decree passed by the trial court is not a decree within the meaning of s. 14(2) of the Act.

The elementary rule of Construction of Wills is that the intention of the testator should be gathered by giving a harmonious interpretation to the various terms of the Will as a whole.

Held, that direction regarding residence of heirs was a pious wish and not mandatory injunction to the legatee so as to create a legal right in the heirs.

The decree contemplated under sub-s. (2) of s. 14 of the Act appears to be a decree finally adjudicating the rights of the parties, where an appeal has been filed against a decree so that the final adjudication of the rights of the parties would depend upon the decree passed in the appellate court the decree passed by the trial Court cannot be said to be a decree contemplated by sub-s. (2). The appeal is a continuation of the suit. The result of the appeal would be that the sanctity of the decree would be taken away and the decree passed by the appellate court adjudication the right of the parties would supersede the decree of the trial court.

Further the decree under subs. (2) of s. 14 contemplates only a decree where the property is acquired by a Hindu widow by the said decree. In other words the decree mentioned in sub-s. (2) is a decree which forms the foundation of the title of the widow where the widow gets a life estate under the right of inheritance possessed by her and the decree merely declares her estate to be a widow's estate, the decree is not the foundation of her right or the basis of her title but merely a recognition of the same.

Smt. Rama Pati Devi and others v. Smt. Chando
Bibi and another

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U. P. Consolidation of Holdings Act, I, of 1954, ss. 9, 10 and 11(1)—Order condoning delay in filing objections—If covered by ss. 9 and 10 and appealable—Indian Limitation Act, 1908, s. 5.

The order referred to in s. 10 is an order on the merits of the controversy between the parties, so, also s. 9 contemplates an order passed in respect of the objections mentioned in the section. Proceedings on an application under s. 5 of the Limitation Act are separate from those under ss. 9 and 10 and these sections or s. 11 do not refer to an order passed on an application under s. 5 of the Limitation Act. Therefore, an order passed on such an application was not appealable.

Samharoo v. The State of U. P. and others ...
 —, s. 21(2)—*First appeal under s. 21(2) to Settlement Officer Consolidation—Second Appeal to Deputy Director of Consolidation under s. 21(5) as it stood prior to U. P. Consolidation of Holdings (Amendment) Act VIII of 1963—Second appeal disposed off—Revision to Deputy Director against the first appellate order not maintainable—Revision against the order of 2nd appeal lay—Proviso to s. 47(1) of U. P. Consolidation of Holdings (Amendment) Act (Act No. VIII of 1963) not applicable.*

Second appeal under s. 21(5), as it stood prior to U. P. Consolidation of Holdings (Amendment) Act (Act VIII of 1963) against the order passed in first appeal by the Settlement Officer, Consolidation, was disposed off by the Deputy Director of Consolidation. The result of the decision of the second appeal was that the first appellate order of the Settlement Officer, Consolidation merged in the order made by the Deputy Director of Consolidation in second appeal. No revision to Deputy Director of Consolidation could be entertained against the order of Settlement Officer, Consolidation made in first appeal after its confirmation in second appeal. However a revision lay against the order dated 16th March, 1963 passed by Deputy Director of Consolidation in second appeal as the proviso to s. 47(1) of U. P. Consolidation of Holdings (Amendment) Act (Act VIII of 1963) was not applicable. Under the main provision of Sub-s. (1) of s. 47 of that amending Act the provisions of the un-amended Consolidation of Holdings Act as it stood before this amending act was passed were applicable to the order in second appeal and consequently a revision against that order lay under the unamended Act to the Deputy Director.

A Deputy Director exercising the power of a Director can competently hear a revision transferred to him even though the revision may be directed against a second appellate order of a Deputy Director. In hearing the revision the Deputy Director exercises the powers of a Director and consequently he can interfere with the order of another Deputy Director.

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U. P. Encumbered Estates Act, 1934—Ss. 2(a), 7(2) and (3) and s. 50 and Code of Civil Procedure (1908), O. XXI, Rr. 58 to 60—S. 2(a) of U. P. E. E. Act—Debt-decree for costs in a suit is a decree for unliquidated damages and is not a debt,—S. 7(3)—Prohibition contained applies to landlord as well as to his heir.

Rules 58 to 60 of O. XXI have to be read together in order to determine the scope of an objection that can be preferred under r. 58.

The two prohibitions envisaged in each of sub-ss. (2) and (3) of s. 7 of the E. E. Act appear to stand at par and cannot be

taken to have been enacted to secure the entire property movable or immovable notified under s. 11 for the liquidation of the decree passed under s. 14 undisturbed by any subsequent dealing of the landlord. The particular provision in sub-s. (3), is one for the benefit of a creditor who cannot be deprived of the same simply because the landlord has died and has been succeeded by his heirs.

"Debt incurred after the passing of the order under s. 6" occurring in sub-s. (3) of s. 7 does not mean debt incurred only by the landlord.

The very absence of these words "by the Landlord" in sub-s. (3) and its use in sub-s. (2) serve as a pointer to the fact that the prohibition envisaged by sub-s. (3) regarding attachment in execution of certain decrees is to operate against all decrees which had been passed on the basis of a private debt incurred after the passing of the order under s. 6 no matter whether the debt is incurred by the landlord or by her heirs. The provisions of s. 50 of the Act also supports this view.

The decree passed in a suit for specified amount with interest on the allegation that the same specified amount had been paid as sale consideration and became refundable because of the vendor's failure to convey the property for want of title is not a decree for unliquidated damages, while the decree for costs in the said suit is a decree for unliquidated damages within the meaning of "debt" as defined in s. 2(a) of the E. E. Act and as such the decree to the extent of costs is beyond the purview of the prohibition contained in s. 7(3) of the said Act.

Allahabad Bank Ltd., Lucknow *v.* Civil Judge,
Bara Banki and others

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U. P. Municipalities Act, 1916, ss. 40(1)(a)(2)(4)(6), 87-A, 113 (1)(2) and 303(b)—*Three consecutive months in s. 40(1)(a)—Computation and meaning of—Refers to calendar month—Opportunity of explanation in s. 40(4)—Import and meaning—What constitutes—Authority who is to give—Service of notice under—Mode—Order not in compliance with s. 40(1)(a)—If a nullity—Scope of sub-s. (1) and (2) of s. 113 if distinct—U. P. General Clauses Act, 1904, s. 4(28).*

The word 'month' in s. 40(1)(a) means calendar month. The period of three consecutive months commences from the first meeting from which the member absented himself. The three consecutive months refers to the period during which the meetings were held, commencing with the first meeting from which the member absented himself and ending with the last meeting from which he was absent.

The opportunity for explanation contemplated under s. 40(4) is both for the charge of absence, and, in the event of being established for the proposed punishment. If the latter is omitted the notice would not be in compliance with the pro-

vision and the order of punishment would be invalid. The provision of s. 40(4) is mandatory. An order passed without giving the opportunity for explanation would be a nullity.

The provision of the two sub-ss. (1) and (2) of s. 113 are distinct in nature and altogether different in object. The doctrine of 'de facto title' embodied in sub-s. (2) cannot be recognised as embodied in sub-s. (1).

Whether the mode of service in s. 303(b) applies to notice in s. 40(4) was doubted.

Abdul Latif Nomani *v.* The Commissioner, Gorakhpur and others

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U. P. (Temporary) Control of Rent and Eviction Act, 1947--
S. 3—Permission to sue on the ground of personal need—Governing principles.

There are, no fixed principles of law governing the exercise of the discretion by the District Magistrate or the Rent Control and Eviction Officer in granting or refusing permission under s. 3 of the Act. The matter being left to the discretion of the District Magistrate or the Rent Control and Eviction Officer, all that High Court at best can see is whether that discretion has been judicially exercised. There must be a fair comparison of the rights of landlord and tenant and permission under s. 3 of the Act should only be granted where it is considered justified that the rights of the tenant should be sacrificed in the interest of the rights of landlord. The principles applicable to a decision on an application under r. 6 of the Rules framed under the U. P. (Temporary) Rent Control and Eviction Act cannot be applied to an application under s. 3 for permission to file a suit.

It is not for the High Court to sit in judgment over the opinion of Rent Control and Eviction Officer or the Additional Commissioner exercising revisional powers in the matter of deciding where equities in such a case lie.

There is no bar under law to an accommodation being broken up into two parts with the permission of a District Magistrate or a Rent Control and Eviction Officer if both the landlord and tenant agree and desire to it.

Dwarka Prasad and others *v.* The Additional Commissioner, Lucknow-Faizabad Division and others ...

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—, ss. 7(2) and 7-A—*Power of allotment—Whether extends to accommodation 'about to fall vacant'—Occupation from before the allotment—Continuance of, in contravention of allotment order—Liability for.*

The power of allotment vested in the District Magistrate order the U. P. Control of Rent and Eviction Act is not limited to accommodation which is or has fallen vacant but covers equally one 'about to fall vacant' and the order of allotment in each

case takes effect from the time it is passed so that the powers and liabilities for eviction under s. 7-A of the Act extend equally to the cases of continuance of an occupation from before the passing of the allotment order, the question of the same being in contravention of the allotment order remaining one of fact for determination in each case.

Ramlal v. Shri Mani Singh disapproved for laying down the broad rule that the continuation after the allotment order of an existing occupation cannot be in contravention of the allotment order.

Babu Lal v. Sheo Nath Das and others ...

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U. P. Zamindari Abolition and Land Reforms Act, 1950 (Act I 1951) as amended by Act I of 1964, s. 3(8)—Constitution of India (1950), Art. 31-A(2)—Abolition and acquisition of Zamindari in areas south of Kaimur Range including Pargana Agori in Mirzapur—Whether valid.

A grant by the British of lands for services rendered to them would be a grant included within the definition of 'estate' under cl. (a)(i) of Art. 31-A(2) of the Constitution.

The areas south of Kaimur Range including Pargana Agori in Mirzapur is accordingly a grant in the nature of *jagir* or *inam* and as such their acquisition by the State of Uttar Pradesh by the relevant notifications under Act I of 1951 as amended by Act I of 1964 is valid being covered and protected by the clause aforesaid of the Constitution although the areas in question could not be placed or shielded under cl. (a)(iii) of that Article in view of the fact that 'forest' or 'waste' land unless held or let for purposes ancillary to agriculture is not an estate.

The State of U. P. and another *v. Raja Anand Brahma Shah* ...

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<p>The question whether any part of the cause of action arose at a particular place is a jurisdictional fact and is open to scrutiny in a revision.</p> <p>Where a clause in a contract laid down by mutual agreement that the contract would be deemed to have been entered at Bombay and the court at Bombay would have jurisdiction, it would be binding and a party to it cannot be allowed to lead evidence in derogation of this agreement to prove that it was actually entered upon at another place.</p>	
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Contempt of Courts Act, 1952, s. 3— <i>Scandalising the court—If Contempt of Court—Publication of pamphlet attributing motive—If fair and bona fide criticism.</i>	

It is true, in suitable cases fair and *bona fide* criticism of judicial acts of the court may sometime be permitted. But where scandalising the court by publication and distribution of pamphlets tends to bring the authority of the court into disrespect and offers insult to the judicial officer and deminishes his dignity and prestige and shakes the confidence of the general public in the impartial administration of justice, it cannot be permitted.

Where the pamphlet among others, attributed motives for having acted against the contemner on considerations other than judicial and on extraneous advice of District Magistrate, Reader and Ahalmad and Inspector of the Court, *held*, that such imputations are bound to impair the image of justice and is a contempt of the court.

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Indian Penal Code, 1860, ss. 188 and 454—*Applicability—Disobedience of order under s. 145, Cr. P. C.—S. 188, I. P. C. applies—'Promulgation' of an order—Order under s. 145, Cr. P. C. prohibiting a party to interfere—Amounts to promulgation—S. 188, I. P. C., includes both judicial and executive orders.*

S. 188, I. P. C. includes in its ambit both executive as well as judicial orders. A judgment or an order passed in open court constitutes a formal declaration to the public of the decision in the case. Therefore, the final order passed in s. 145, Cr. P. C. is a promulgation at least to the parties, and consequently s. 188, I. P. C. would apply.

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Judgment—Pronouncing of—judgment reserved—cannot be pronounced without fixing a date and giving notice to the parties affected—Motor Vehicle Act, 1939, s. 61-A—Limitation for revision—Computation of.

Once a judgment is reserved it cannot be pronounced without fixing a date for its pronouncement and giving a notice of that date to the parties concerned. If it is subsequently pronounced without complying with that requirement, may be on the very date on which it was earlier reserved, it can have no effect in the eye of law till notice of it is given to the parties effected by it.

The Regional Transport Authority having heard the item, reserved the judgment on 19th April, 1965 but subsequently announced it on that very day without giving intimation to the party affected and the party could know about the order on May 6, 1965.

Held, though the order may have been passed on April 19, 1965 it would be deemed to have been passed on 6th May, 1965

for the purpose of computing limitation for revision under s. 64-A Motor Vehicles Act.

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Code of Criminal Procedure, 1898, s. 417(3)—*“Institution of case” and “taking of cognizance of a case”—difference—Complaint for offence under s. 408, I. P. C. filed in Court of Magistrate—Magistrate first thought to try it as warrant case but later on committed it to Court of Sessions—No termination of proceedings—case does not cease to have been instituted upon complaint—s. 417(3) applies.*

There is difference between the terms “institution of a case” and the “taking of cognizance of a case”. Institution of a case is an act of a suitor, while taking of cognizance is an act of the Court. A case is instituted when a suitor brings it before a Court, but cognizance is taken of an offence by a court when it decides to proceed with it. By instituting a case the suitor draws the attention of the Court to the offence and desires that the Court may take cognizance of it.

Ball was set rolling in this case before the Court of a Magistrate by the complaint of the appellant. The proceedings continued before him and ultimately he thought it fit to commit the accused to stand his trial before the Court of Session. By committing the accused to stand his trial in this manner the proceedings did not terminate but they continued before the Court of Session and the continuity having not been broken, the case does not cease to have been instituted upon a complaint. Proceedings under s. 198-B, Cr. P. C. take their birth in the Court of Session itself on a complaint. Proceedings for which the accused is committed to stand his trial before the Court of Session continue before that court on committal, but they have already taken their birth at an earlier stage before a Magistrate in one or other of the modes provided in s. 190, Cr. P. C.

Held, though the Court of Session took cognizance of the case on the order of committal of the accused to that Court, the case did not cease to be one instituted upon complaint withir the meaning of sub-s. (3) of s. 417, Cr. P. C.

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Motor Vehicles Act, 1939, s. 47, sub-ss. (1) and (3)—Sub-s. (3)—“Matters”—meaning of—Decision by R. T. A. under sub-s. (3) to increase the strength of a particular route—Discretionary—Prior notice to existing operators not necessary.

The “matters” referred to in sub-s. (3) and required to be taken into consideration for determining the strength on any route, mean only what is stated in cls. (a) to (f) of sub-s. (1) and do not include “representation” required to be taken into consideration by the final clause of sub-s. (1) while disposing of

an application for stage carriage permit and thus it is not incumbent on R. T. A., to afford an opportunity to the existing operators to make representations, if any, before taking a decision in regard to the strength on any route under sub-s. (3). Neither there is any provision in the Act or in the rules requiring a notice being given to an existing operator in regard to a proposal to increase the number of operators on a route nor the determination of such matter affects prejudicially an existing operator so as to entitle him to be heard before the proposed action is taken under sub-s. (3) of s. 47 of the Act.

S. 47(3) appears to confer discretion on the R. T. A. in the matter of determination of strength on a route and the same is to be exercised after taking into consideration various matters enumerated in cls. (a) to (f) of sub-s. (1).

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Representation of the People Act, (43 of) 1951, s. 116-A—Conduct of Election Rules, 1961, r. 73(2)—Appeal against the order of the Tribunal in the election petition—Filing of decree—Whether necessary—Marking of ballot paper by figure 1 in Roman form—Whether valid.

Representation of the People Act does not require the preparation of a decree after the conclusion of the trial of an election petition and accordingly no copy of the decree need be filed with the memorandum of appeal to the High Court.

R. 73(2) of the Conduct of Election Rules does not warrant and cannot justify the declaration of a ballot paper as invalid if it is marked by the figure 1 in one form or the other including Roman form. If any word like "st" or "one" in bracket is put down after the figure 1, the words can be ignored. The construction is borne out by the explanation added subsequently to the rule under consideration for the purpose of removing the doubt or difficulty in question.

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U. P. Industrial Disputes Act, 1947 (as amended by U. P. Act I of 1957), s. 6-H(1) and (2)—Respective scope of sub-s. (1) and (2)—No predetermined amount—Contested questions involved—Case would fall under sub-s. (2)—State Government or its delegate have no jurisdiction to issue certificate when amount not determined by Labour Court.

In the context of sub-s. (1) the phrase 'money due' postulates liquidated or special sum. The State Government can only satisfy itself as to the arithmetical correctness of the claim. But if there is a dispute as to the calculation of the amount, as distinct from its arithmetical verification, the matter is outside the ambit of sub-s. (1). Disputed cases fall

under sub-s. (2) and the Labour Court has to determine the amount at which the benefit should be computed.

Thus, if the claim is to money under the three mentioned cases and the only genuine dispute relates to its arithmetical verification, it can be dealt with under sub-s. (1). All other cases fall under sub-s. (2) which only the Labour Court is competent to determine.

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—1947, s. 6(6)—Award by Labour Court or Tribunal—award became final under s. 6(5)—correction of error or omission thereafter—Labour Court or Tribunal became functus officio; Order under s. 6(6) passed after the award became final under s. 6(5)—Order eminently just and equitable—order not liable to be quashed.

The Labour Court or the Industrial Tribunal becomes *functus officio* after the expiry of 30 days from the date of publication of the award under s. 6(3) and as such, after that period, it cannot amend, alter or correct the award under s. 6(6) of the Act. Once an award becomes enforceable under s. 6-A of the Act, it becomes final under s. 6(5) of the Act and cannot be disturbed because finality of the award cannot be taken away by the unilateral act of the Labour Court or the Industrial Tribunal.

In the instant case, though, the order under s. 6(6) was passed after the expiry of 30 days from the date of publication of award under s. 6(3) yet it would not be liable to be quashed because of its being eminently just, and equitable, serving the cause of justice.

Tulsipur Sugar Co. Ltd. v. The State of U. P. and others

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U. P. (Temporary) Control of Rent and Eviction Act, 1947, s. 7-F—Power of revisional authority—Possession delivered to allottee during pendency of revision—Revision cannot fail—State Government competent to cancel allotment order.

The revisional authority is as much free to deal with the question of allotment as the District Magistrate was himself free at the time he passed the order of allotment. It is impossible to sustain the contention that a revision filed under s. 7-F must fail merely because during its pendency the possession has been delivered to the allottee. If the State Government has power to revise an order of allotment under s. 7-F and if the State Government in exercise of that power comes to a conclusion that the order of allotment deserves to be set aside, it has but to set it aside.

Kartar Singh v. The State of Uttar Pradesh and others

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U. P. Zamindari Abolition and Land Reforms Act, (I of) 1951, s. 152—Right of a Bhumidhar to transfer his interest—Principles of Hindu Law governing co-parcenary property—Applicability—Whether Bhumidhari rights owned by a Hindu family, if joint Hindu property.

Bhumidhari rights are special rights created by the Act and these new rights are to be governed by the provisions of that Act. The notions of Hindu Law or Mohammedan Law cannot be imported into the rights created by this special law. The principles of co-parcenary property are not applicable to Bhumidhari rights. S. 152 of the Act clearly gives a right to a Bhumidhar to transfer his interest in the Bhumidhari properties. The question of legal necessity is not relevant in such a case.

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——, 1951, ss. 209, 211-A, 229-D, and 331—*Suit under s. 211-A(p) for injunction and in alternative for possession and mesne profits—Jurisdiction—If lies in Civil Court.*

Suit for possession subsequent to dispossession—Not covered by s. 209—S. 331 does not apply—Civil Court can take cognizance;

Suit prior to dispossession—If proceedings under s. 211-A initiated on the grounds contemplated under s. 167 or s. 206—Relief for declaration available under s. 229-D—S. 331 applies—Civil Courts jurisdiction barred—If proceedings under s. 211-A initiated on the ground under s. 210(1)—Relief not available under s. 229-D—S. 331 does not apply—Civil Court can take cognizance.

A suit for possession brought subsequent to the plaintiff's dispossession under an order passed in proceedings under s. 211-A would not at all be a suit of the nature covered by s. 209 of the Act but would be a suit of a completely different nature and would thus be cognizable by a civil court because s. 331 of the Act would not at all apply to bar its cognizance by the civil court. But if the plaintiff was in possession of the disputed land and only an order of ejectment under s. 211-A had been passed against him, then s. 331 of Z. A. & L. R. Act will apply only if it is possible to hold that such a suit is in respect of a cause of action for which relief can be had from the revenue court by filing a suit for declaration under s. 229-D of the Act.

If the proceedings under s. 211-A were initiated on any of the grounds contemplated under s. 167 or s. 206 it would be possible for the appellant to claim the relief of declaration under

s. 229-D, alleging that he was sirdar of the land still as he had not made any transfer or did any act of perversion and as such s. 331 would apply as a bar to the cognizance of the suit by the civil court.

But if the proceedings under s. 211-A, were taken against the appellants on the ground that he was sirdar having acquired such rights under s. 210(1), the position would be different because in that case he would still be the sirdar of the land, and would have no occasion to seek a relief of declaration to that effect and such a suit (against the order passed under s. 211-A) would not be covered by s. 229-D and as such s. 311 would not be a bar to its cognizance by the civil courts.

Baldeo and another *v.* Charam

—Chap. IX—A—Ss. 240-D, 240-J, 330 and 331—Compensation statement prepared under s. 240-D—Appellant's name recorded as sirdar—No objection filed—Consolidation authorities not precluded from deciding that the respondent was sirdar of land—Ss. 330 and 331 do not bar such decision by consolidation authorities.

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—S. 240-G—“Persons interested”—meaning of—S. 240-H(b) “involves a question of title”—meaning of.

There is no provision in Chap. IX-A under which an adjudication in respect of *adhivasi* or *sirdar* can be made. Chap. IX-A only deals with the acquisition of the rights of an intermediary or a landlord in respect of his land occupied by *adhivasi* and for payment of compensation to him. It also declares the law that any person, who is an *adhivasi* of such land, shall become *sirdar* thereof, but the machinery for the determination of the question whether a particular person is or is not an *adhivasi* and, therefore is or is not a *sirdar*, is not contained in Chap. IX-A of the Act, but is contained in ss. 229-B and 234-A of the Act. Further there is nothing in s. 240-D which requires that in a compensation statement an entry giving the names of the various persons who are *adhivasi* and have consequently become *sirdars* should be made, if some names are, in fact entered it is only for the ancillary purpose of showing that it is a land occupied by *adhivasi* and therefore, no finality can be attached to the entry in the compensation statement of a particular name shown as *adhivasi* in respect of a plot of land.

Held, the entry of the name of the appellant as *adhivasi* or *sirdar* in the compensation statement prepared under s. 240-D and which became final under s. 240-J of Z. A. & L. R. Act, was no bar against the consolidation authorities deciding as to whether the appellant or the respondent was the *adhivasi* or *sirdar* of the plots in dispute. S. 330 or s. 331 of the Act also does not

bar the investigation of the question as to who is the *adhivasi* or the *sirdar* of the plots in dispute by the Revenue Courts.

The words "person interested" in s. 240-G, U. P. Z. A. & L. R. Act mean person interested in receiving the compensation. There is no provision for the filing of objections by persons claiming to be *adhivasis* or *sirdars* of the land acquired. The expression "involves a question of title" occurring in cl. (b) of s. 240-H of the same Act means, when the question is raised as to who is entitled to receive compensation.

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Code of Civil Procedure, (Act F of) 1908, s. 51 proviso (c)—
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assets or money in the hands of a partner—Whether in a
fiduciary capacity—Liability of managing partner for deten-
tion in prison in execution of decree for the same.

In the absence of special circumstances a partner cannot be regarded as a kind of trustee for other partners or liable to render accounts to them in a fiduciary capacity. The managing partner is, as such, not liable to detention in prison under cl. (c) of the proviso to s. 51 of the Code of Civil Procedure in execution of the money decree against him for the partnership assets.

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Contract Act IX of 1872, s. 124—Contract for indemnity—If
can be implied—Provision in a conveyance whereby purchaser
agrees to pay off an encumbrancer—If gives rise to a contract
of indemnity—Failure to pay—Remedy—Limitation for—Date
of the accrual of cause of action for a suit for indemnity—
Applicability of Art. 83 Limitation Act to implied contract of
indemnity,—Limitation Act, IX of 1908, Arts. 83, 115 and
 116.

Where there is a Covenant in a conveyance of sale whereby the purchaser agreed to pay off an encumbrancer, a contract of indemnity is implicit, and, such a contract may be implied. The failure to discharge the encumbrance within such time as provided expressly or impliedly may give rise to two different causes of action. Firstly, the vendor is entitled to bring an action to have himself put in a position to meet the liability which the purchaser failed to discharge. In such a case, the limitation will run under Art. 116, Limitation Act (or under Art. 115 where the deed is unregistered) from the date on which the purchaser ought to have paid off the encumbrance. Secondly, the vendor, if he incurs loss, may also sue on the contract of indemnity to which Art. 83 Limitation Act would apply, even though the contract is implied.

The cause of action for a suit on a contract of indemnity, where the encumbrance was a mortgage, arises not when the final decree on the mortgage is passed but when the vendors are actually damnified. (In this case when the vendor was obliged to execute self-liquidating mortgage).

Shanti Swarup v. Munshi Singh and others
 —ss. 172, 173, 174, 175 and 176—Pledge and pawn—Debtor
*executing promissory note and also an agreement to pledge
 goods as security—Fact of the delivery of goods to pledgee
 proved, but pledgee denying the pledge and suing on the pro-
 missory note—Pledgee—If entitled to recover the balance of
 the loan.*

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Where a pawnee files a suit for recovery of debt, though he is entitled to retain the goods, he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to re-deliver the goods on payment and therefore, if he has put himself in a position where he is not able to re-deliver the goods he cannot obtain a decree. In such a case he has to give credit for the value of the goods and can recover only the balance.

Where a promissory note was executed and also goods were pledged as security, but the pledgee denying the pledge filed a suit on the promissory note, but the fact of delivery of goods to him as security was proved.

Held, that the pledgee would not be entitled to a decree against the promissory note and also retain the goods found to be in his custody.

Lallan Prasad v. Rahmat Ali and another
**Hindu Succession Act, 1956, s. 23—Applicability of—Daughter's
 right to enforce partition of dwelling house.**

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Where, one B, the absolute owner of a dwelling house dies leaving behind him his widow, three sons and four daughters and, later on, one of his sons S dies leaving behind him, his widow and two daughters S and K and the house remained unpartitioned;

Held, the daughters S and K of the deceased son S can claim partition of the dwelling house to the extent of their share as s. 23 of the Hindu Succession Act, 1956, does not apply in the instant case. S. 23 can apply if S had left any male heirs. The date on which B died is wholly immaterial for the applicability of s. 23, as the question of devolution of the deceased son's share in the house, on his heirs, will not relate back to the death of B. It is only in the case of limited owners that the question of devolution has to relate back to the death of the last absolute male owner of the property. After the death of B, who was the absolute owner of the house, all his heirs, i.e., his widow, sons and daughters inherited the house and became co-partners and not co-parceners, having an absolute ownership and not limited ownership. It is erroneous to think that the succession on the death of B and the succession on the death of S were interconnected. On the death of S the entire bundle of his rights including right to enforce partition in the house in dispute devolved upon his two daughters i.e., S and K and his widow,

Savitri Devi and others *v.* Gauri Shanker and others ...

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Indian Evidence Act, 1872, s. 9—Identification parade—Purpose and necessity of—Offence ss. 399 and 402, I. P. C. proved against the accused arrested on the spot—Failure to put up the accused for identification—Effect.

The purpose of identification test is to test the memory and veracity of a witness who claims to identify an accused person as the participant or one of the participants in a crime. Such identification test may be needed in a case of dacoity, assembling of persons for the purpose of committing dacoity, riot and any other offence the participants in which were not known to the witnesses from before and could not be apprehended at the spot. If, an alleged culprit has been arrested at the spot, his capability will depend on the veracity of witnesses who would say that he had committed the offence. It is not necessary to put up such arrested persons for identification at an identification parade. There may be cases in which the accused himself may claim identification test in order to support his plea of non-participation in the crime. In such a case, the court may consider the request of the accused on its merits and may in a suitable case require the prosecution to hold an identification parade.

Where accused were arrested on the spot and the prosecution fully proved that they were in the gang which had assembled at the time and place as alleged by the prosecution with the intention of committing dacoity after having made preparation for the same;

Held, that failure to put up the accused for identification test does not cause any infirmity in the prosecution case.

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Khudkasht right—*Acquisition of—Co-heir and Co-sharer or co-owner—cultivatory possession of one co-heir is possession for the benefit of all co-heirs—cultivatory possession of one co-owner or co-sharer is possession for himself.*

A distinction should be drawn between co-owners and co-heirs. A co-owner taking possession of any plot of land under his own cultivation would have secured *khudkasht* rights for himself and not for other co-sharers in that *Khewat*. But the same does not apply when a person dies and his *Khudkasht* devolves on his sons who are more than one in number. In that case if one of those sons continues to cultivate that inherited *khudkasht* land, he would be deemed to be doing it for the benefit of all his co-heirs unless he is able to prove a clear case of ouster of other co-heirs. Hence the position of co-heir is different from that of mere co-owner.

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U. P. (Temporary) Control of Rent and Eviction Act, III of 1947, s. 7(2)—*Landlord obtaining decree for ejectment and executing it—Another found in possession having an allotment order—Validity of allotment order—Premises split up with the consent of the landlord—Allotment of one split portion—Legality—Allottee seeking permission—Consent of landlord—Necessity of.*

Where the landlord had obtained a decree for ejectment of the tenants and had put in execution whereunder warrants of possession had been issued it could be assumed that the accommodation had fallen vacant or was about to fall vacant and allotment thereafter would be valid and if the allottee had taken possession it would be regular. Consent of the landlord for taking over possession by virtue of allotment order is not necessary.

Where a premises is split up in two with the agreement of the landlord and two allotment orders have been passed, it would not be illegal.

Mahant Suryanand Giri *v.* Girdhari Lal

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U. P. Tenancy Act, 1939—*Explanation 1 of s. 180(1)—applies to the cases of co-owners or co-proprietors and not to the case of co-sharers.*

The Explanation 1 of s. 180(1) of the U. P. Tenancy Act, 1939 applies to cases of co-owners or co-proprietors and not to co-heirs.

Ram Pal and another *v.* Joint Director, Consolidation, U. P. Lucknow and others

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U. P. Panchayat Raj Act, 1947, ss. 2(ss), 95(1)(g), 96-A; s. 2(ss)—*Expression 'Appropriate Authority'—Meaning of—'Designate' and 'appoint'—Difference between—Order under s. 95(1)(g) passed by Additional S. D. O. and approved by D. M.—Right of filing the appeal to D. M. not lost—Rule 'one*

should not hear cases against his own decision'—Basis of:—Delegation of power—Power can be exercised either by delegator or the delegatee—Superintendence by High Court over tribunal—Constitution of India, Art. 227.

The expression "appropriate authority" in s. 2(ss) of the U. P. Panchayat Raj Act means the authority competent to designate or appoint an Additional Sub-Divisional Officer. The difference between designate and appoint is this that an officer already holding a post may also be designated as Additional Sub-Divisional Officer whereas a person may be appointed only as Additional Sub-Divisional Officer having no other functions to discharge.

There is a clear difference between the competency of an appeal and the right of a particular presiding officer to hear it. The particular District Magistrate concerned having approved of the order of removal passed by the Additional Sub-Divisional Officer may be said to have disqualified himself from hearing the appeal but it cannot be said that the right of filing the appeal itself was lost. The rule that one should not hear cases against his own decision is based on a rule of public policy and on principles of natural justice that no party shall be judge of his own cause. The rule is based on notions of propriety and on the principle that not only justice should be done but it should also seem to be done.

It is well settled that merely because power is delegated, the delegator does not lose the power. It can be exercised either by the delegator or the delegatee.

A. S. D. O. Kaiserganj and another *v.* Mohammad Afaq

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U. P. Zamindars' Debt Reduction Act, XV of 1953, s. 2(f) (vi)
and Constitution of India, Art. 14.

Sub-cl. (vi) (of cl. (f) of s. 2 of the U. P. Zamindars' Debt Reduction Act is invalid being violative of Art. 14 of the Constitution of India.

—s. 2(f) (vi)—*Portion of the definition invalid—Effect of such invalidity on the Act.*

The invalid portion, however, is severable from the valid portion with the result that the definition of 'Debt' contained in the main portion of cl. (f) remains alive so as to make the Act itself enforceable irrespective of the fact that the invalid portion becomes inoperative.

Brij Kumari and another *v.* Raja Mohammad Mustafa
Ali Khan

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APPELLATE CIVIL

Before Mr. Justice Mathur

KUBER SINGH AND ANOTHER (APPELLANTS)

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March 12

v.

DRIGVIJAI SINGH AND OTHERS (RESPONDENTS)

Code of Civil Procedure (Act V of) 1908, s. 105, O. 43, r. 1,
Remand—Finality of finding or direction in the order of,—
Scope—Mode of calculation of profits of mortgaged property
not laid own in order of remand—Determination according
to principle laid down in a case in existence but not cited
at the stage of remand order—Permissibility of.

The consistent view of all the High Courts in India is that any finding, decision or direction expressly recorded or implicit in the order of remand is final and cannot be re-opened in that proceeding in the same or any other Court. Points against the remand order which could be but were not raised stand on the same footing. That would not, however, apply to such points in support of the order of remand.

Accordingly, where the case is remanded by the High Court made in the remand order, the question whether certain mortgages for determining afresh according to law and the observations stood fully paid up at a particular point of time but except for comments nothing was laid down as to how the profits to be credited towards the mortgages were to be determined, it is open to the Court below to calculate the same according *inter alia* to the principle laid down in a case precedent on the point which was in existence but not cited at the time the remand order was passed.

Second Appeal no. 3021 of 1958 against judgment and decree of AKHTAR HUSAIN, Civil and Sessions Judge, Banda, in Civil Appeal no. 18 of 1946 decided on 27th March, 1958.

V. K. S. Chaudhry, for the Appellants.

Radha Krishna, for the Respondents.

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MATHUR, J.:—This is a Second Appeal by Kuber Singh and another, minor sons of Bhagwan Din *alias* Bachcha, against the decree and judgment of the Civil and Sessions Judge of Banda, dismissing their appeal, on the ground that the entire mortgage debt of Rs.1,500 was due when their father sold 9 Bigha 1 Biswa land to the defendants-mortgagees on 28th May, 1941 and as the sale was for payment of genuine antecedent debts, it could not be set aside at the instance of the sons.

The material facts of the case are that the plaintiffs' father and uncle had usufructuarily mortgaged 17 Bigha 3 Biswas of the their zamindari property in favour of Pearey Singh, father of Beni Madho Singh, on 29th August, 1919 for a sum of Rs.835. In 1924, the plaintiffs' father executed another usufructuary mortgage of 3 Bigha 5 Biswas land in favour of the same mortgagee for a sum of Rs.685. On 28th May, 1941 the plaintiffs' father sold 9 Bigha 1 Biswa land for Rs.1,500 to the mortgagee as a result of which the earlier mortgages of 1919 and 1924 were fully paid out of the sale consideration. This sale was successfully pre-empted by Arjun Singh, defendant no. 1, whereafter he entered into possession of the property sold.

The plaintiffs instituted the present suit in 1945 for possession of 9 Bigha 1 Biswa land sold to defendant no. 2, and then in possession of defendant no. 1, with the allegation that the property was joint and ancestral property and had been sold without any legal necessity and without consideration. It is said that the two mortgage debts were satisfied out of the usufruct and on the date the sale-deed was executed no amount was due under the two mortgages. Consequently, the sale was without consideration.

Defendant no. 1 contested the suit on the ground that the sale-deed had been executed for payment of antece-

dent debts and hence was binding on the sons and that the mortgage debts had not been paid up and the sale-deed was for valid consideration.

After accepting the defendant's version, the Munsif dismissed the suit, but the appellate court took a different view and allowed the appeal of the plaintiffs. The appellate court held that the mortgage debts had already been paid up in full before the execution of the sale-deed in 1941 with the result that the sale was without consideration and hence could be challenged by the sons.

Arjun Singh, defendant no. 1 had died meanwhile and his legal representatives preferred a Second Appeal before the High Court. The High Court allowed the Second Appeal on 9th November, 1956 and remanded the appeal for a fresh decision according to law in the light of the observations made therein.

When the appeal was taken up afresh for hearing, the lower appellate court recorded additional evidence of the parties and, on the basis of the Full Bench decision in *Dara v. Mathura* (1), which was brought to its notice on the date of argument, dismissed the appeal on the ground that the total mortgage debt was due and hence the sale-deed was for consideration and for payment of antecedent debts. The lower appellate court, however, recorded the finding that if the Full Bench decision was not made applicable and profits were calculated as in the earlier stages of the litigation, the total mortgage-debts shall be fully paid up and in such a case the sale shall be without consideration. The plaintiffs are naturally challenging this decree on two grounds: firstly, that after remand the lower appellate court had no jurisdiction to apply to the instant case the decision in the above Full Bench case; and secondly,

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(1) A.I.R. 1951 All. 643.

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that profits in accordance with the law laid down in the above Full Bench case had not been determined. In this connection, it was contended that the circle rates were filed at the stage of argument, and the plaintiffs had no opportunity to lead evidence as to the fair occupation rent at which profits were to be worked out.

The order of remand passed by the High Court in the above Second Appeal was appealable and hence any finding recorded or direction given in the Second Appeal while remanding the appeal for a fresh hearing could not be reagitated before the court below or before the High Court and the only remedy available to the aggrieved party was to prefer an appeal against the order of remand. No such appeal was filed. The material point for consideration, therefore, is whether UPADHYA, J. had given any direction as to how profits shall be calculated. If, in the eye of law, such directions were given, they cannot be reagitated at a subsequent stage even though by inadvertence the above Full Bench case had not been brought to the notice of the Judge hearing the Second Appeal; but if no finding was recorded or direction given such that it would be binding on the parties, the matter could be re-considered and all the points in issue could be raised before the lower appellate court. In such circumstances, the lower court shall be deemed to have acted rightly by following the Full Bench decision.

A perusal of the order of remand passed in the Second Appeal makes it clear that certain legal points had been finally decided, though other connected points or other points had been left open for decision by the lower appellate court. For example, a finding was recorded with regard to the scope of s. 30 of the U. P. Agriculturists' Relief Act, though the effect of this provision had been left open for consideration. It was

held that the contention raised by or on behalf of the defendant that in absence of an application under the provisions of the U. P. Agriculturists' Relief Act, the liability in respect of the mortgages remained intact, was without force. The finding recorded in the Second Appeal, therefore, was that the liability under the mortgages stood reduced automatically on the coming into force of the U. P. Agriculturists' Relief Act. The question left open for consideration was whether as a result of the reduction of the debt the mortgages stood automatically redeemed.

Thereafter the mode of calculation of profits was commented upon. The lower appellate court had recorded the finding, based upon certain calculations, that the amount of the two mortgages had been paid up in full prior to the execution of the sale-deed. The finding based on such calculation was not upheld. UPADHYA, J. hearing the Second Appeal observed that there was no evidence on record to determine the prevailing market rates of grain, nor the possible expenses incurred in raising and harvesting the crop, that no allowance was made for the straw consumed by the bullocks and that an assumption as to the expenses on cultivation had been made. It was observed that it was not possible to do justice on such presumptions and it was essential that the matter be considered in a judicial manner. It was thus considered necessary to send back the case to the lower appellate court for a fresh decision of the appeal after considering the matter in a proper manner and deciding the issues involved on the basis of evidence. The lower appellate court was given the power to admit further evidence on any question that it may have to decide. In the operative part of the order of remand, the lower appellate court was directed to decide the appeal afresh according to law in the light of the observation made above.

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The above suggests, and, in fact, makes it clear, that the mode of calculation by the lower appellate court had been challenged before UPADHYA, J. and all the observations made by him show that, according to him, the judgment of the lower appellate court was based on assumptions and the matter could not be deemed to have been considered judicially in a proper manner. It is true that in the Grounds of Appeal and also at the time of the hearing of the Second Appeal, no reference was made to the above Full Bench case. In fact, there was no suggestion that only fair occupation rent could be adjusted towards the mortgage debts. However, one thing is clear that except for the comments it was not laid down how the profits be credited towards the mortgages were to be determined. In substance, no directions were given, nor was any finding recorded as to what part of the profits or what annual amount was to be credited towards mortgages. The whole matter was left open.

A reference can now be made to the various reported decisions which have been brought to my notice. *Satyadhan Ghosal v. Smt. Deorajin Debi* (1), simply lays down that the correctness of an order of remand can be challenged in appeal from the final decision provided that the order of remand is not appealable. Prior to the order of remand the lower appellate court had recorded the finding that both the mortgages had been fully satisfied, and when the High Court remanded the appeal for a fresh hearing the person to feel aggrieved would be the plaintiffs, and not the defendant, unless some finding was recorded or direction given against him. Consequently, the observations of UPADHYA, J. shall not disentitle the defendant from raising before the lower appellate court the mode of calculation of profits unless

(1) A.I.R. 1960 S.C. 941.

the observations made are deemed to be a finding or direction by the High Court and as such are final.

In *G. H. Hook v. The Administrator General of Bengal* (1), it was held that:

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"When a question at issue between the parties to a suit is heard and finally decided, the judgment given on it is binding on the parties at all subsequent stages of the suit. Its binding force depends not upon the Code of Civil Procedure, s. 11, but upon general principles of law; if it were not binding, there would be no end to litigation."

Similarly, *The Court of Wards v. Raja Leelanund Singh* (2) lays down that neither the Courts in India nor the Judicial Committee itself could go behind the decision or order of the Judicial Committee in a former appeal arising out of the same suit or proceeding. What had been declared by the Judicial Committee in the former appeal was

"So much of the land in question as might, upon such inquiry, appear to be comprised in the said Bunkur and Boondie Mehals or Ghazuts belonged to Havelee, and that plaintiff was entitled to recover the residue of the land in question."

At another place it was observed that

"In the course of that, it found that two mouzahs named, the one Gormaha or Kormaha, the other, Ghora-Khore, which lay partially, if not wholly, within the disputed territory, had been advisedly relinquished by the Revenue Authorities pending the resumption-proceedings, as part of the Nizamut Mehals, and accordingly that so much of the disputed land as was appurtenant to these

(1) XIX A.L.J.R. 366.

(2) XXV Sutherland Weekly Reporter 157.

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mouzahs belonged to and ought to be adjudged to, the plaintiff."

One of the settlement proceedings conducted was conducted by Mr. Piron. These observations make it clear that the Judicial Committee had recorded a finding as to the rights of the parties and it was merely to be considered how much of the disputed land was appurtenant to Gormaha or Ghora-Khore, and such land was held to belong to the plaintiff. The land appurtenant to the two mouzahs was to be determined with reference to Piron's settlement.

On remand the Calcutta High Court recorded evidence beyond the jurisdiction of its inquiry. The cause for recording such evidence appears from the argument raised at the Bar. It was contended that it was open to the parties under the order of remand to show that the inclusion of land in Mr. Piron's settlement was intentional or improper. The evidence was thus recorded to question the propriety of the settlement and its binding force upon the plaintiff.

When a decision was given as to the rights of the parties and the properties or the kind of properties which belonged to the plaintiff, and further inquiry was to be conducted to find out the land included in Mr. Piron's settlement, all the points in issue had been decided and the further inquiry was restricted only to the determination of the land which, according to Mr. Piron's settlement, was appurtenant to the two mouzahs, and belonged to the plaintiff. There was thus a clear finding, and after remand such finding was binding on the parties. In the instant case, however, no such finding or direction was given: only comments were made.

In *Chunnilal v. Habib Ali* (1) the trial court had framed seven issues, but during the trial recorded a

(1) A.I.R. 1916 All. 215.

finding on three only, one of which is not material for purposes of this case. The subordinate Judge found that the mortgage-deed had been duly executed by Shaukat Ali, but the payment of consideration was not satisfactorily proved. In appeal the due execution of the bond was not challenged and on the other point a Bench of this Court recorded the finding that the payment of consideration was proved. Thereupon, the suit was remanded for decision on merits. It was during the fresh hearing of the suit on remand that the defendant raised the question that the mortgage bond had not been attested in accordance with the law. This new point was raised on the basis of a Privy Council decision given since after the remand. It was held that after the order of remand became final, the question of attestation of the mortgage bond could not be raised during the subsequent proceedings. This view was adopted because in the original appeal the plaintiff could have reagitated the question of the execution of the bond in support of the decree which had been passed by the trial court. What this case, therefore, lays down is that a point which could be raised to oppose the remand cannot be raised at a subsequent stage; but a party who could argue an additional point to obtain the remand, shall not ordinarily be bound by the omission, that is, no decision being given on the additional point. It often happens that only one of the many points raised or which could be raised may be sufficient to obtain an order in one's favour and to save the time of the Court only that point may be argued, and not others. In any case, the above case does not lay down that a point which could have been raised by the successful party in support of the order passed in his favour cannot, if necessary, be raised at a subsequent stage.

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Musammat Masihunnissa v. Musammat Kaniz Sughra (1), does not lay down any proposition beyond what can be inferred from the above discussed Allahabad case.

The Judges hearing the case of *Janki Shaha v. S. Mahomed Abbas* (2), had followed the Privy Council decision in *G. H. Hook v. The Administrator General of Bengal* (3) and consequently it is not necessary to make further comments on this case. The purpose shall be served by observing that in this case a finding was recorded at an earlier stage on one question of limitation and after remand the defendant was permitted to plead that the suit was barred by Art. 144 of the Limitation Act. This view appears to be in conflict with the decision in the two Allahabad cases referred to above. If the suit was barred under Art. 144 of the Limitation Act, the order of the courts below dismissing the suit would have been proper and no occasion for remand would have arisen. Consequently, when the unsuccessful party did not raise the plea of Art. 144 in the Second Appeal prior to the remand of the suit, it could not be permitted to be raised at a subsequent stage. This is what was held in the two Allahabad cases, but the Oudh Chief Court permitted the party to raise at a subsequent stage a point which could have been raised to oppose the order of remand. The Oudh case is thus more helpful to the defendant than to the plaintiffs appellants.

In *Ethiraja Mudali v. Muthu Reddi alias Muthukrishna Reddi* (4), the Judge remanding the suit to the trial court had given directions as to the basis on which the scaling down should be made in view of the Madras Act, 24 of 1950, which had come into force during the pendency of the Second Appeal. The order of remand was not challenged in appeal, nor was an attempt made

(1) 60 Indian Cases 975.

(3) XIX A.L.J.R. 366.

(2) A.I.R. 1923 (Oudh) 50 (2).

(4) A.I.R. 1961 Madras 410.

to have the order reviewed. It was held that the directions given were within jurisdiction and those directions could not be challenged at a subsequent stage.

Charles N. Ambrose v. Meenakshi Ammal Ramal Ammal (1), is another case where it was laid down that the parties were bound by the terms of the remand order and it was necessary for the court below to comply with the directions contained in the remand order. Similarly, it was held in *Ramkuvarbai v. Damodar Narbheram* (2), that the correctness of the law or of any finding recorded while passing the order of remand cannot be challenged at a subsequent stage in the same proceeding, either before the courts below or before the higher Courts. See also *Sambhu Yellareddy v. Laxamma* (3), *Bisai Nath v. Tara Nath Deb* (4) and *Smt. Lalbati Kuer v. Satchitanand Verma* (5).

Kaluram v. Mehtab Bai (6) is a case laying down that any matter expressly or impliedly decided by the order of remand cannot be re-opened after remand. Similarly, in *Bai Bai v. Mahadu Marati* (7), the giving of anticipatory and provisional reasoning in respect of matter of an issue not decided by the trial court, given in support of the finding on the preliminary issue decided by the trial court, was held not to be final. This case thus makes a differentiation between a finding, decision or direction given in the case and mere observations made in support of the order of remand. The last case brought to my notice is of *Laxman Shivashankar v. Saraswati* (8). This merely lays down which findings recorded in a suit have the force of *res judicata*. No detailed comments need be made on the scope of s. 11, C. P. C. or the principle of *res judicata*. It can simply

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(1) A.I.R. 1953 Travancore-Cochin 109.

(2) (1869) 6 Bombay High Court Reports 146.

(3) A.I.R. 1965 Andhra Pradesh.

(4) A.I.R. 1923 Cal. 385.

(5) A.I.R. 1960 Pat. 418.

(6) A.I.R. 1959 M. P. 131.

(7) A.I.R. 1960 Bom. 543.

(8) A.I.R. 1961 Bom. 218.

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be observed that every observation made does not operate as *res judicata*. It invariably depends on the facts and circumstances of the case whether a finding recorded can or cannot be re-agitated at a subsequent stage or in another suit.

The consistent view of all the High Courts, therefore, is that any finding, decision or direction given in the order of remand is final and cannot be re-opened in the same proceeding before the same Court or before any other Court. This principle is applicable to not only findings, decisions or directions expressly recorded in the case, but also to such findings, decisions or directions which can, by implication, be deemed to have been recorded. Similarly, if any point is not raised before the remand and the point is such which would have made the remand unnecessary, such point cannot be permitted to be raised at a subsequent stage, otherwise there would be no finality to any proceeding. However, all the observations made in a case cannot be placed in the same category as a finding, decision or direction. It very often happens that the remand of the case may be necessary not on one ground but on many, and for purposes of remand the party may raise only one point, and not all. Any comments made on the point raised cannot, therefore, be interpreted to mean that the other points were given up for ever, or can not be raised during the re-hearing after remand.

It is true that, in the instant case, the mode of calculation was challenged on certain grounds, and not all; but if the points already raised did not appeal to the Court, the party could, with the permission of the Court, raise other points even though not taken in the Grounds of appeal, all the more, when there existed an earlier decision of the Court in his favour. In any case, the additional points could, if necessary, be raised by way

of review, but no review application shall be maintainable where the order is in favour of the party. Review is sought for only when the order is against the party and he desires to have an order in his favour. Similarly, the party not challenging the order of remand cannot appeal against that order. The appeal is not against any finding, direction or observation, but is against the decree or final order passed in the case. A party submitting to the order of remand cannot prefer an appeal simply because some of the observations made are not in his favour. In this view of the matter, it was open to the defendant-respondent to raise a fresh point at the time of the re-hearing of the appeal in support of his contention that by the time the sale-deed of a part of the mortgaged properties was executed, the mortgage money had not stood paid up in full.

This takes up to the consideration of the facts of the instant case. A perusal of the Court's order dated 9th November, 1956 in Second Appeal No. 1670 of 1949, whereby the appeal was remanded for a fresh decision according to law in the light of the observations made in the order, makes it clear that a final opinion was expressed on certain questions of law, and not all. The finding of the lower appellate court that the amount of the two mortgages had been paid up in full by the time the sale-deed in dispute was executed, was challenged, and this finding was regarded to be such as could be interfered with in Second Appeal. The finding was set aside on the ground that it was based on assumptions, and not on judicial evidence. It was observed that there was no evidence to prove the prevailing market rates of grains and the possible expenses incurred in raising and harvesting the crops. It was further observed that it was essential that the matter be considered in judicial manner, and it was necessary to send the case back to the lower appellate court for a fresh decision

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after considering the matter in a proper manner and deciding the issues involved on the basis of evidence. The lower appellate court was permitted to admit additional evidence, if necessary. It will thus appear that the mode of calculation of profits to be adjusted towards the mortgage money was specifically challenged in the Second Appeal, but the learned Judge hearing the appeal nowhere laid down that after remand the mode of calculation adopted by the courts below was to be followed. In fact, the use of the words "in a judicial manner" and "in a proper manner" suggests that everything was left open. When this Court gave no direction as to the mode of calculation of profits to be adjusted towards the mortgage money, any observation made shall not operate as *res judicata*, nor shall such observations debar the defendant from placing reliance upon an earlier decision of this Court and contending that the profits be calculated in the manner laid down in that case. The lower appellate court thus acted rightly by taking the earlier decision in *Dara v. Mathura* (1) into consideration and deciding the appeal on its basis even though such points had not been raised earlier, not even at the time of the remand.

From the material on record, it, however, appears that the defendant relied upon the above Full Bench case at a late stage after the close of the evidence, when he filed *Khasra settlement* and *Parta settlement*. These two documents are not and cannot be treated as conclusive evidence of "fair occupation rent" of the mortgaged properties. As laid down in the above Full Bench case, "fair occupation rent" at which profits must be worked out is the most favourable rate of rent at which the land could be let out. The most favourable rate of rent shall invariably be the rate of rent at which land was let out during the material period. In the absence of such evidence, profits could be calculated on

(1) A.I.R. 1951 All. 643.

the basis of sanctioned rent-rates (circle rate) treating such rate to be a fair occupation rent. In view of the fact that the documentary evidence was filed at a late stage, the plaintiffs-appellants were naturally handicapped in leading proper evidence. The remand of the appeal for determination of fair occupation rent and for the fresh decision of the appeal is thus necessary so that none of the parties may be prejudiced.

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The Second Appeal is hereby allowed in the sense that the decree under appeal is set aside and the appeal is remanded for a fresh hearing in accordance with the law. Costs of this Court shall abide the decision of the appeal. Considering that the litigation has been pending for about 20 years, the lower appellate court is directed to expedite the hearing of the appeal.

Appeal allowed.

SUPREME COURT

*Before the Hon'ble Mr. Justice Wanchoo, the Hon'ble
Mr. Justice Shelat and the Hon'ble Mr. Justice
Mitter*

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September
14.

HAR SWARUP AND ANOTHER (APPELLANTS)

v.

BRIJ BHUSHAN SARAN AND OTHERS (RESPONDENTS)
(ON APPEAL FROM THE HIGH COURT AT
ALLAHABAD)

**Representation of the People Act (43 of) 1951, ss. 82(b),
90(3) and 123(2)—Corrupt Practice—Threat of force by a
candidate after withdrawal against an elector in support of
contesting candidate—Whether amounts to,—Non-joiner of
such candidate, in election petition—Effect of.**

The threat of force extended by R. (after withdrawal of candidature) to an elector in the event of his not voting or canvassing support for a contesting candidate amounts to an allegation of corrupt practice against R and in view of his being included in the expression 'any candidate' under s. 82(b) of the Act, the election petition without impleading him (R) as one of the respondents would be defective and liable to dismissal under s. 90(3) of the Act.

Kapildeo Singh v. Suraj Narain Singh (1), over-ruled.

Case-law discussed.

Civil Appeal No. 1141 of 1965 from the Judgment and Decree, dated the 17th April, 1963 of the Allahabad High Court in First Appeal No. 2 of 1963.

Naunit Lal, for the Appellants.

Veda Vyasa, for the Respondent.

The following Judgment of the Court was delivered by—

WANCHOO, J.:—This appeal on a certificate granted by the Allahabad High Court raises the question of
(1) A.I.R. 1959 Pat. 250.

interpretation of s. 82(b) of the Representation of the People Act, no. 43 of 1951, (hereinafter referred to as the Act). The facts necessary for present purposes are these. In the election to the U. P. Legislative Assembly from Dehra Dun City Constituency in 1962, Brij Bhushan Saran respondent was one of the candidates and was declared elected. One Raturi Vaid was another candidate at the same election. He however withdrew his candidature within the time fixed for withdrawal. He belonged to the same party as the returned candidate and worked for him. After the election, an election petition was filed by two electors praying that the election of Brij Bhushan Saran be set aside, and one of the grounds with which alone we are concerned in the present appeal was that Raturi Vaid had threatened an elector after the date of his withdrawal from the candidature that the elector's bones would be broken if he did not cast his vote for Brij Bhushan Saran and also did not work for him and persuade others to vote for him. The Election Tribunal held that this amounted to a corrupt practice within the meaning of s. 123(2) read with the proviso (a) (i) thereof. It further held that as this corrupt practice was committed by a candidate, namely, Raturi Vaid, it was necessary to join him as respondent to the petition. As this was not done, the Tribunal dismissed the petition under s. 90(3) of the Act.

Thereupon there was an appeal to the High Court, which upheld the view taken by the Tribunal. The High Court however granted a certificate to appeal to this Court; and that is how the matter has come before us.

It is not in dispute now that the allegation made with respect to the conduct of Raturi Vaid would amount to a corrupt practice within the meaning of s. 123(2) of the Act. What is however contended is firstly that there was no allegation of corrupt practice against Raturi

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Vaid, and secondly that even if that was so, Raturi Vaid could not come within the meaning of the words "any other candidate" used in s. 82(b) inasmuch as he withdrew his candidature as provided in s. 37 of the Act.

We are of opinion that there is no force in the first contention raised on behalf of the appellants. There is no doubt that the allegation was that it was Raturi Vaid who gave the threat, though it was alleged that he did so in furtherance of the election of Brij Bhushan Saran and on his behalf. Whatever may be the effect of such a threat held out by Raturi Vaid on the election of Brij Bhushan Saran, the primary allegation certainly was that it was Raturi Vaid who had committed the corrupt practice, though Brij Bhushan Saran was also alleged to be party to it and therefore liable for the consequences. In these circumstances it is impossible to accept that the allegation of corrupt practice was only against Brij Bhushan Saran and not against Raturi Vaid. As we have said already, the primary allegation was against Raturi Vaid, though Brij Bhushan Saran was also made liable for the corrupt practice alleged to be committed by Raturi Vaid on the ground that it was done on his behalf and in furtherance of his election. It must therefore be held that there was an allegation of corrupt practice against Raturi Vaid in this case.

This brings us to the main question raised in the present appeal, namely, whether Raturi Vaid can be said to be "any other candidate" within the meaning of those words in s. 82(b). In this connection, the appellants rely on a decision of the Patna High Court in *Kapildeo Singh v. Suraj Narayan Singh* (1), which certainly is in their favour. That decision however has not been accepted by the Allahabad High Court which took the view that even though Raturi Vaid might have withdrawn his candidature under s. 37 of the Act, he

(1) A.I.R. (1959) Pat. 250.

would certainly be covered by the words "any other candidate" in s. 82(b).

The word "candidate" has been specially defined in s. 79(b) for the purpose of Parts VI, VII and VIII of the Act, and s. 82(b) with which we are concerned is in Part VI. According to this definition, a "candidate" means a person who has been or claims to have been duly nominated as a candidate at any election, and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate. It cannot be and has not been disputed that Raturi Vaid is covered by this definition, for he was duly nominated though he later withdrew his candidature under s. 37 of the Act. What is however contended is that even though Raturi Vaid might be a candidate within the definition of s. 79(b) this is a case where in the context of s. 82(b), the words "any other candidate" mean a candidate who has not withdrawn under s. 37 of the Act. Part VI provides for disputes regarding election and begins with s. 79, which defines certain words including the word "candidate" as used in this Part. S. 30 provides for an election petition and s. 81 for presentation of such petition and other matters. Then comes s. 82 which is in these terms:—

"A petitioner shall join as respondent to his petition—

(a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

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(b) any other candidate against whom allegations of any corrupt practice are made in the petition."

The terms of s. 82 show what persons must be joined as respondents to an election petition. Cl. (a) shows that where a petitioner is only claiming a declaration that the election of all or any of the returned candidates is void, he has to join all the returned candidates to the petition and no more. Further where the petitioner in addition to claiming a declaration that the election of all or any of the returned candidates is void claims a further declaration that he himself or any other candidate has been duly elected, he has to join not only the returned candidates but all the contesting candidates. So far as the words "returned candidates" and "contesting candidates" are concerned, there is no difficulty as to what they mean. A returned candidate is one who has been elected and a contesting candidate is one who has not withdrawn his candidature under s. 37. It is true that in cl. (a) of s. 82 where we find the words "he himself or any other candidate", "any other candidate" there means any other contesting candidate. That is clear from the context, for there is no question of declaring a person who has withdrawn his candidature as duly elected. But the same in our opinion cannot be said of the words "any other candidate" used in cl. (b) of s. 82. There is no indication in cl. (b) to suggest that "any other candidate" only refers to a candidate who has not withdrawn his candidature under s. 37. The use of the words "any other candidate" in cl. (b) is really in contrast to the candidates who are to be made parties under cl. (a). Under cl. (a) persons who are to be made parties to the petition are—

(a) returned candidates,

(b) contesting candidates,

depending upon the kind of declaration claimed in the petition. Where, for example, there is no claim for a further declaration in an election petition; only returned candidates would be made respondents under cl. (a). But if there are allegations of corrupt practice against any candidate other than the returned candidate, he would have to be made a party under cl. (b) as "any other candidate". Similarly where a declaration is asked for in the petition that a particular candidate has been duly elected, all the returned candidates as well as all the contesting candidates have to be made parties under cl. (a). Even in such a case if there is allegation that any other candidate besides the returned candidates and the contesting candidates has been guilty of corrupt practice, cl. (b) requires that he should also be made a respondent. There is in our opinion no reason for cutting down the meaning of the word "candidate" as defined in s. 79(b) for the purpose of s. 82(b) in the manner suggested on behalf of the appellants, namely, that in s. 82(b) the candidate is only one who has not withdrawn his candidature under s. 37.

We are of opinion that the context does not so require and as a matter of fact it does appear necessary to give the full meaning to the word "candidate" in s. 82(b) as defined in s. 79(b). Take the case of a candidate like Raturi Vaid who was apparently an alternative candidate of the party to which Brij Bhushan Saran belonged and who withdrew his candidature after Brij Bhushan Saran's nomination was accepted. Suppose that instead of committing the alleged corrupt practice after he withdrew his candidature, Raturi Vaid was alleged to have committed it before his withdrawal. In such a case it is conceded on behalf of the appellants that till the withdrawal under s. 37 of the Act, the person withdrawing is still a candidate for, according to the appellants, it is only after he withdraws that he can no longer

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be called a candidate. So if Raturi Vaid had committed the alleged corrupt practice before the date of his withdrawal under s. 37 he would even according to the appellants, be a candidate at the time when he is said to have committed the corrupt practice and would be a necessary party under s. 82(b). We however see no reason why he could not be a candidate for the purpose of s. 82(b), simply because he committed the alleged corrupt practice after his withdrawal. Purity of elections is a matter of great importance, and it is for the purpose of maintaining this purity that we have the provisions contained in s. 123 of the Act. There is also no doubt that if a covering candidate (like, Raturi Vaid) is not treated as a candidate till the date of his withdrawal, he would be free to commit all kinds of corrupt practices defined in s. 123 of the Act on behalf of the candidate whom he covers with impunity. This could not be the intention of the Act and that is why learned counsel for the appellants had to concede that if the alleged corrupt practice had been committed before the date of withdrawal, it would be necessary to join Raturi Vaid as a respondent under s. 82(b). But the argument is that as the alleged corrupt practice was committed after the date of his withdrawal he would not be a candidate within the meaning of s. 82(b). We are of opinion that if the effect of withdrawal is said to be that a person nominated can no longer be considered to be a candidate only after his withdrawal, the date of withdrawal cannot be a dividing line as to the time up to which he can be treated as a candidate and the time after which he cannot be treated as a candidate. If purity of elections has to be maintained a person who is a candidate as defined in s. 79(b) of the Act will remain a candidate even after he withdraws till the election is over, and if he commits a corrupt practice whether before or after his withdrawal he would be a necessary

party under s. 82(b) of the Act. We are therefore of opinion that the view taken by the Patna High Court on which reliance has been placed on behalf of the appellants is not correct and the decision of the High Court under appeal is correct.

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We may in this connection refer to two decisions of this Court. In *Mohan Singh v. Bhanwarlal* (1), it was held that by the definitions of the word "candidate" in s. 79(b), the expression "any other candidate" in s. 82(b) must include a candidate who had withdrawn his candidature. The same view was taken in *Amin Lal v. Hunna Mal* (2). In that case it was held that a duly nominated candidate though he withdrew his candidature within the time permitted by the Rules must for the purpose of s. 82 be still regarded as a candidate. It has been urged that the point was not contested in these two cases and therefore the decision therein is not binding. With respect, we agree with the view taken in these two cases for the reasons which we have already given. It is not disputed that if Raturi Vaid was a candidate within the meaning of that word in s. 82(b), the election petition was liable to be dismissed under s. 90(3) of the Act.

The appeal therefore fails and is hereby dismissed with costs.

Appeal dismissed.

(1) (1964) 5 S.C.R. 12.

(2) (1965) 1 S.C.R. 893.

SUPREME COURT

APPELLATE CIVIL

*Before the Hon'ble Mr. Justice Wanchoo, the Hon'ble
Mr. Justice Shelat and the Hon'ble Mr. Justice
Mitter*

1966

September,
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RAGHUBANS NARAIN SINGH (APPELLANT)

v.

THE U. P. GOVERNMENT THROUGH COLLECTOR OF
BIJNOR (RESPONDENT)

[ON APPEAL FROM THE HIGH COURT AT
ALLAHABAD]

*Land Acquisition Act, (I of) 1894, ss. 23 and 28—Market
value of land acquired—How ascertained—Award of interest
—ambit of discretion in grant of—Point of law not speci-
fically raised in cross-objection—Permissibility of.*

Market value on the basis of which compensation is payable under s. 23 of the Land Acquisition Act means the price which a willing purchaser would pay to a willing seller for a property having due regard to its existing condition, with all the advantages, and its potential possibilities when laid down in its most advantageous manner, excluding any advantage due to the carrying out of the scheme for the purposes for which the property is compulsorily acquired.

The evidence of an offer from an intending purchaser cannot be equated in importance with the evidence of proper specimen sales of properties in the neighbourhood, it is none the less relevant as evidence of one's opinion about the value of the property and if made *bona fide* and without compulsion or special circumstances for the proposed purchase, ought to be accepted in preference to the annual crop value which is not always an adequate method of valuation.

The grant of interest under s. 28 of the Act is discretionary but once the discretion to grant interest is exercised there is no further discretion in the matter of rate of interest which, as provided, must be at the rate of 6 per cent per annum.

Where a question of law is raised for the first time in a Court of last resort upon the construction of a document or

upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interest of justice to entertain the plea. The High Court may, therefore, go into the question of the necessary rate of interest although the same has not been specifically raised in the cross-objection.

Civil Appeal No. 82 of 1964 from the Judgment and Decree, dated the 13th March, 1959 of the Allahabad High Court in First Appeal No. 74 of 1949.

B. C. Misra (M. V. Goswami with him), for the Appellant.

N. D. Karkhanis (O. P. Rana with him), for the Respondent.

The following Judgment of the Court was delivered by—

SHELAT, J.:—This appeal by certificate from the High Court at Allahabad involves the question as to the valuation of a piece of land belonging to the appellant situate outside the town Nehtaur, in district Bijnor, U. P. The land measures 6 pucca bighas and is grove-land having in all 123 trees of which a number are mango and naspati trees.

The notification under s. 4 of the Land Acquisition Act, I of 1894 was issued on 22nd December, 1945 in which it was stated that the land was being acquired for a public purpose, viz., the construction of a hostel, etc., of S. N. S. M. High School at Nehtaur. Possession of the land was taken from the appellant on 4th July, 1947. The Collector of Bijnor made his award under s. 11 of the Act fixing Rs.1167-4-0 as compensation for the trees, Rs.1050-12-0 as compensation for the land adding 15 per cent solatium awarded the total sum of Rs.2218. A reference was thereafter made under s. 18 at the instance of the appellant to the District Judge, Bijnor. Both the appellant and the Government led oral evidence and also adduced evidence of

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certain specimen of exemplar sales. Besides the oral evidence, the appellant relied on two sale deeds, one dated 20th March, 1926 and another dated 5th January, 1934. He also led the evidence of one Syed Nisar Haider Zaidi, a Deputy Collector who had just retired and who prior to his retirement had written two letters to the appellant dated 14th October, 1945 and 20th November, 1945 expressing his desire to purchase the land in question with a view to build a residential house for himself so that he could live therein after his retirement. In these letters he had offered Rs.18,000 but that offer was not accepted by the appellant as he wanted Rs.24,000 as the price of the land. On behalf of the Government also reliance was placed on three specimen sales being Exhibits A-1, A-2 and A-3. The evidence disclosed that the land acquired was at a distance of about 2 furlongs from the town Nehtaur which at that time had a population of about 18,000 souls. The land abuts on the main road from Moradabad to Bijnor and is next to the said school. Nearby is a fairly large size pond. The evidence of Murari Singh, one of the witnesses examined by the Government, was that besides the appellant's grove there were some other groves nearby on the other side of the road, that the town was a growing town in the sense that electricity was available, there was a branch of the Bharat Bank and there were 5 or 6 mills and a crusher working in the town since the last few years. The mills referred to by the witness obviously must be some small scale industries. The witness however stated that only 2 or 4 new houses had been constructed in the town during the last about 10 years though one more school had been opened in the town about 3 years ago. As against his evidence there was some evidence that some houses were constructed in the grovelands nearby. But there was no evidence to show that there was any building activity nearby of

any substantial nature or that there was any definite trend of development in the direction of the acquired land. As regards the income from the land there was the evidence of Pushkar Nath that the fruit trees grown in the land yielded approximately an annual income of Rs.500, about 49 mango and naspati trees being fruit bearing at that time. It appears that the grove had been laid only about two or three years ago. But the evidence of the Village Patwari clearly disclosed that the grove would yield about Rs.1,000 a year when all the trees started bearing fruits. Besides the income from the trees the land also yielded an income of about Rs.200 a year by way of sale of Bind pullas.

The District Judge discarded the evidence of specimen sales produced by both the sides as being of no assistance for the reasons stated by him. It is not necessary to examine those reasons as there is no dispute that he was right in rejecting them and the High Court also agreed with him that that evidence was of no help in arriving at the correct valuation. The District Judge, however, was impressed with the evidence of witness Zaidi and accepting the offer conveyed by him as genuine and *bona fide* held on the basis of that offer that the value of the land could be safely assessed at Rs.18,000; and adding to that sum the solatium at 15 per cent he awarded Rs.20,700 as compensation. He also held that the appellant was entitled to interest under s. 28 but allowed interest at 3 per cent per annum observing that since the acquisitions was for an educational institution, interest at that rate was proper.

Against the said judgment and order the Government filed an appeal before the High Court at Allahabad and the appellant also filed his cross-objections. As already stated the High Court agreed with the District Judge that the evidence of specimen sales was of no

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assistance. But regarding the evidence of witness Zaidi it commented as follows:

"It is not possible for us to say as to whether the approach made by Syed Nisar Haider Zaidi was a genuine one or not; but even if we take it to have been a genuine approach there can be no doubt that the price that he was going to offer was a price which he fixed because of the peculiar circumstances in which he was placed, the circumstances having been that he was, upon retirement, desirous of going back to his native place and to take up residence there and to build a house outside the populated area. The price which such an exceptional purchaser is going to offer will not afford a true test about the value of the property."

Having thus rejected the evidence of the specimen sales and also the offer evidence of witness Zaidi the High Court fell back on the net annual income from the land which it estimated at Rs.650 and multiplying it by 20 fixed the value of land at Rs.13,000. Adding to that figure the solatium at 15 per cent the High Court awarded in all Rs.15,000. As regards interest the High Court rejected the appellant's contention that he was entitled to interest at the rate of 6 per cent per annum on two grounds: (1) that the question as to the rate of interest was not specifically raised in his cross-objections and (2) that s. 28 was discretionary and therefore the District Judge could fix the rate of interest up to 6 per cent per annum and that it was not incumbent upon the court to award interest at 6 per cent per annum as contended by the appellant. The appellant has challenged in this appeal the correctness of the judgment and the order of the High Court both on the question of valuation and the rate of interest.

The first contention raised on behalf of the appellant is that the High Court's judgment suffered from an infirmity in that it failed to take into account the potential value of the land as a building site in view of the evidence as to the town's recent development. This contention, in our view, has no substance. Market value on the basis of which compensation is payable under s. 23 of the Act means the price that a willing purchaser would pay to a willing seller for a property having due regard to its existing condition, with all its existing advantages, and its potential possibilities when laid out in its most advantageous manner, excluding any advantage due to the carrying out of the scheme for the purposes for which the property is compulsorily acquired. As observed in *South Eastern Rail Co. v. L. C. C.* (1):

"The value to be ascertained is the price to be paid for the land with all its potentialities, and with all the use made of it by the vendor."

Dealing with the doctrine of potential value this Court in *N. B. Jeejabhoy v. The District Collector, Thana* (2) observed as follows:

"A vendor willing to sell his land at the market value will take into consideration a particular potentiality or special adaptability of the land in fixing the price. It is not the fancy or the obsession of the vendor that enters the market value but the objective factor, namely, whether the said potentiality can be turned to account within a reasonably near future The question therefore, turns upon the facts of each case. In the context of building potentiality many questions will have to be asked and answered: whether there is pressure on the land for building activity, whether the acquired land is suitable for building purposes,

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(1) (1915) 2 Ch. 252.

(2) C. A. Nos. 313 to 315 of 63
decided on Aug. 30, 1965.

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whether the extension of the said activity is towards the land acquired, what is the pace of the progress and how far the said activity has extended and within what time, whether buildings have been put up on lands purchased for building purposes, what is the distance between the built-in-land and the land acquired and similar other questions will have to be answered. It is the overall picture drawn on the said relevant circumstances that affords the solution."

It is clear that there is no evidence on record of any building activity of a substantial nature being carried on in the neighbourhood of the acquired land at about the time when the notification was issued in 1945. There is equally no evidence of any trend of development of the town in the direction of the acquired land. The only evidence was as to the existence of the school nearby, of the land abutting on the road and of some houses having been built on the opposite side of the road in some of the grovelands. Such evidence however would not constitute an ascertainable trend of development of the town in the direction of the acquired land or of any active building activity nearby. Clearly, therefore, no question of the valuation having to be made on the basis of the potentiality of the land as building site can possibly arise. The contention of Mr. *Mishra* in this regard therefore must be rejected.

But the next contention urged by him is a substantial one and requires consideration. He argued that the High Court fell into error in rejecting the evidence of witness Zaidi accepted as reliable by the District Judge and in substituting that finding by its own estimate of the annual income derived from the land. The evidence of witness Zaidi being the evidence of an offer made by him cannot of course be equated in importance

with the evidence of proper specimen sales of properties in the neighbourhood. Obviously an offer does not come within the category of sales and purchases but none the less if a person who had made an offer himself gives evidence such evidence is relevant in that it is evidence that in his opinion the land was of a certain value. But the evidence that the owner refused an offer so made amounts to this only that in his opinion his land was worth more than the figure of value named or that the offer was for some other reason such that he was not willing to accept. (cf. *Government of Bombay v. Merwanji Muncherji*) (1). It has also been held that an agreement to sell is a relevant matter and can be used in relation to fixing the value of the acquired land. (cf. *Governor-General in Council v. Ghiasuddin*) (2). There can however be no doubt that apart from Zaidi's offer being relevant it was not an offer similar to an offer made by an irresponsible broker as commented in *Government of Bombay v. Merwanji Muncherji* (1). There is nothing also to show that he or the appellant knew that a notification for acquisition was about to be issued or that he colluded with the appellant to fabricate evidence of an offer to enable the appellant to get better compensation. There is not even a faint suggestion in the cross-examination on behalf of the Government that his offer was not genuine or that it was irresponsible. What is more significant is that no suggestion was made in his cross-examination that the offer was excessive or that it was not *bona fide* or that he had made it without properly considering it or without regard to the situation and the suitability of the land. There was therefore no justification in the remark made by the High Court that it could not be said whether his offer was genuine or not. The District Judge accepted it as genuine and if the High Court did not agree with his

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(1) 10 Bom. L.R. 907.

(2) 30 P.I.R. 212.

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assessment of his evidence it ought to have given reasons for such disagreement. It is impossible thus to treat the evidence of Zaidi either as unacceptable or irrelevant. The second criticism by the High Court of Zaidi's evidence that his offer was made in exceptional circumstances and therefore cannot be regarded as one of a willing prospective purchaser is also not correct. At the time when Zaidi made his offer he was about to retire. He wanted to retire in his native place and desired to have a house which would be situate outside the town. His offer was for a groveland with plenty of trees some which were already bearing fruits and the rest were likely to yield fruit in the near future. The land abutted on the road, was next to the school and some houses had already been built on the other side of the road. In these circumstances it is difficult to appreciate why the High Court thought that the offer was not of a willing prospective buyer. There were other groves nearby and Zaidi had therefore an opportunity to select, if he wanted to, there being nothing to show that the owners of the other such land were not willing to sell. Probably he selected this land because it was situated next to the school and abutted on the road. In view of these facts it is difficult to see how the High Court came to the conclusion that he made the said offer in special circumstances, agreeing to purchase the land under compulsion or stress of circumstances. Since his evidence was not challenged either on the ground that his offer was not *bona fide* or that he offered to buy under compulsion or under any special circumstances there was no valid reason why the High Court should have refused to accept the appreciation of his evidence by the District Judge and resort to a method of valuation not always adequate, viz., the annual crop value. Such a method of valuation is not adequate at least for two reasons: (1) that the owner may not have so far put his property to its best

use or in the most lucrative manner and (2) in a case like the present the grove had not yet started giving the maximum yield. Such a method of valuation by ascertaining the annual value of the produce can and should be resorted to only when no other alternative method is available. We are of the view that the District Judge was right in accepting the evidence of Zaidi and in treating his offer as one of a willing prospective purchaser. The valuation made by the District Judge on that evidence rested on a better footing in the circumstances of the case and ought to have been accepted by the High Court.

On the question of interest, Mr. *Mishra* contended that under s. 28 neither the District Judge nor the High Court had any discretion in allowing interest at a rate less than 6 per cent. He argued that this question being purely one of construction and not depending on any finding of fact even though the question was not specifically raised in the appellant's cross-objections before the High Court the High Court ought to have allowed interest at 6 per cent. Mr. *Karkhanis*, on the other hand, argued that what section 28 does is to provide for a ceiling of the rate of interest. And even if that is not so, since the section confers discretion on the court to grant or not to grant interest that discretion impliedly means that even where the court grants interest it can do so at any rate upto 6 per cent. The contention so put forward resolves itself into two questions: (1) whether in the absence of a specific objection as to interest in the appellant's cross-objections the High Court ought to have gone into that question and (2) whether on a proper interpretation of section 28 the Court has a discretion to grant interest at a rate less than 6 per cent. The first point would not create any difficulty in the way of the appellant because the

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High Court did in fact go into the question of interest even though it was not specifically taken in the cross-objections and decided the question on interpretation of s. 28. Besides, the question is purely one of law and as Lord Watson said in *Connecticut Fire Insurance Co., v. Kavanagh* (1):

"When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea."

S. 28 reads as follows:

"If the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum etc."

In its plain language the discretion that is conferred on the Court is whether in the given circumstances of a particular case the court should award interest or not. The words "may direct" mean that it is discretionary on the part of the court to grant or refuse to grant interest. But the words following those words, viz., "the Collector shall pay interest on such excess at the rate of six per centum per annum" would mean that once the discretion to grant interest is exercised there is no further discretion and the interest if awarded has to be at the rate of six per centum per annum. This also appears to be the construction of s. 28 so far understood. It is because the section leaves no discretion as regards the rate of interest that the Central Provinces Act XVII of 1939 by

(1) (1892) A.C. 472.

s. 2 provides that the rate of interest shall be at a rate which shall be not less than 3 per cent per annum and not more than 6 per cent per annum in place of the words "at the rate of six per centum per annum" in s. 28. Some of the other State legislatures such as Madras, Gujarat, Maharashtra and Punjab have instead of using the abovementioned phraseology substituted 6 per cent in s. 28 by "4 per cent per annum". The result of these amendments is that whereas in the case of the Central Provinces (now Madhya Pradesh) the Court has a discretion to grant interest at anything between three to six per cent, in the case of the other States the court has to award interest at the rate of 4 per cent. We are told that no such amendment has been carried out in U. P. The consequence is that s. 28 as it stands must apply and therefore where the court exercises its discretion and grants interest the interest has to be at the rate of 6 per cent. The construction which we are inclined to place on s. 28 is to a certain extent supported by the same expression used in s. 34 which also deals with interest and which provides that when the amount of compensation is neither paid nor deposited before taking possession of the acquired land "the Collector shall pay the amount awarded with interest thereon at the rate of six per centum per annum" etc. It is a well settled rule of construction that where the legislature uses the same expression in the same statute at two places or more than the same interpretation should be given to that expression unless the context requires otherwise. That being so, there is nothing wrong in permitting the appellant to raise the point as to the rate of interest as that question depends only upon the construction of s. 28. In the view that we have taken as to the interpretation of s. 28 Mr. *Mishra* must also succeed on this question.

In the result, the appeal must be allowed and the judgment and order passed by the High Court set aside. The

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judgment and order of the District Judge by which he fixed the compensation at Rs.20,700 including solatium at the rate of 15 per cent is restored. But we direct that the interest on the excess amount of Rs.18,482 should be paid to the appellant at the rate of six per cent per annum from 4th July 1947 up to the time of payment. The respondent will pay to the appellant his costs throughout.

Appeal allowed.

SUPREME COURT

APPELLATE CIVIL

*Before the Hon'ble Mr. Subba Rao, Chief Justice, the
Hon'ble Mr. Justice Bachawat and the Hon'ble
Mr. Justice Shelat.*

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APPELLANTS

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... RESPONDENT

(ON APPEAL FROM THE HIGH COURT AT
ALLAHABAD)

U. P. (Temporary) Control of Rent and Eviction Act (III of)
1947, s. 3(1)(c)—*Alteration material but not likely to diminish
value—Whether sufficient to sustain suit for eviction.*

In order to maintain a suit for eviction under s. 3(1)(c) of the Control of Rent and Eviction Act, it is enough to establish unauthorised construction by the tenant which has materially altered the accommodation i.e. is one which has materially or substantially changed the front or the structure of the premises. If so, it need not be proved further that the same is likely substantially to diminish the value of the accommodation which is the alternative ground for a suit under cl. (c).

Civil Appeal No. 643 of 1964 from the Judgment and Decree, dated the 17th January, 1961 of the Allahabad High Court in S. A. No. 930 of 1959.

G. B. Agarwala, (Champat Rai, E. G. Agarwala and P. C. Agarwala with him), for the Appellants.

S. T. Desai (J. P. Goyal with him), for the Respondent.

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The following Judgment of the Court was delivered by—

SHELAT, J.:—This appeal by Special leave is directed against the judgment and decree passed by the High Court at Allahabad in Second Appeal No. 930 of 1959.

The question arise in this appeal: (1) with regard to interpretation of s. 3(1)(c) of the U. P. (Temporary) Control of Rent and Eviction Act, III of 1947 and (2) whether the alterations carried out by the respondent-tenant were alterations which materially altered the accommodation within the meaning of the said cl. (c).

The appellants are the owners of a building situate on Dashaswamedh Road in Varanasi, the ground floor of which consisted of two shops separated by a partition wall and an arch in between. The respondent was the tenant of one of these two shops. The other shop, adjacent to the respondent's shop, had been let out to one Banarsidas Lohar. The said Banarsidas vacated the shop and thereupon with the necessary sanction of the Rent Control Officer it was let out to the respondent as from 24th July, 1954. On 21st July, 1954 the respondent executed a rent note by which he *inter alia* agreed that he would not have any right to make any alterations, additions or 'Tor phor of any sort' in the said shop. The respondent took possession of the said shop thus becoming a tenant of both the shops. On 8th August, 1954, the appellants at the request of the respondent removed the said partition wall and replaced the said arch by iron girders enabling the respondent to have a compact and commodious unit. There is no dispute that about the middle of October, 1954, the respondent started making alterations in the said shop without the consent of the appellants. Thereupon the appellants first by a telegram and then by letters called upon the

respondent to refrain from making the said alterations as such alterations were contrary to the express covenant contained in the said rent note. Ultimately by a notice dated 22nd February, 1955, they terminated the said tenancy and called upon the respondent to hand over quiet and vacant possession. On the respondent failing to do so the appellants filed a suit for ejectment and other incidental reliefs claiming that as the said alterations were material alterations they were entitled to file the suit for eviction without obtaining therefor the permission of the District Magistrate as required by s. 3(1) of the said Act.

The relevant part of s. 3(1) reads as under—

“Subject to any order passed under sub-s. (3) no suit shall, without the permission of the District Magistrate be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds. . . .

* * * *

(c) That the tenant has, without the permission in writing of the landlord, made or permitted to be made any such construction as, in the opinion of the court, has materially altered the accommodation or is likely substantially to diminish its value.”

Both the Trial Judge and in appeal against his judgment and decree the First Additional Civil Judge, Varanasi, concurrently found that the respondent had carried out alterations, that he did so without obtaining the consent of the appellants and that the alterations consisted of lowering of the floor level of the shop by about 1½ ft. by excavating earth therefrom and putting up a new floor, of lowering correspondingly the front door which entailed cutting and removal of the plinth-band on which the door rested, of lowering likewise the

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level of the staircase in the shop and putting up new steps thereto and lastly of lowering the height of the *chabutra* outside the shop so as to correspond it to the level of the new ground floor of the shop. Both the courts found that these alterations were material alterations of the accommodation within the meaning of s. 3(1)(c) and held that the appellants were entitled to file the suit without obtaining the permission of the District Magistrate and to a decree of eviction.

Aggrieved by the judgment and decree of the 1st Additional Civil Judge, the respondent filed a Second Appeal in the High Court. The High Court accepted the concurrent finding of the two courts below that the respondent had carried out the said alterations without the appellants' consent and agreed that the said alterations amounted to material alterations. But it was argued before the High Court that cl. (c) of s. 3(1) would not apply as on a proper interpretation of that clause the appellants had also to establish that the alterations, besides being material alterations, were likely substantially to diminish the value of the accommodation. The High Court held that there was no finding by either of the courts below that any harm or damage had been caused to the building and on that footing reversed the judgment and decree passed by the lower court, allowed the respondent's appeal and dismissed the appellants' suit.

Mr. *Agarwal*, for the appellants, contended before us that the interpretation placed by the High Court on s. 3(1)(c) was erroneous inasmuch as the High Court failed to appreciate that cl. (c) was disjunctive and that it would apply either where the alterations are material alterations or, even if, they are not, they are likely to diminish substantially the value of the accommodation. He also contended that the alterations were material

alterations within the meaning of cl. (c) and that therefore the appellants were entitled to a decree for eviction, they having been carried out without the permission of the appellants. Mr. *Desai*, on the other hand, argued that the word "or" in cl. (c) should be read as "and" and therefore unless the appellants also established that the alterations had diminished or were likely substantially to diminish the value of the accommodation cl. (c) would not operate and the suit would not be maintainable without the permission of the District Magistrate. He also argued that the said alterations in fact enhanced the value of the accommodation as held by the High Court and were not material alterations within the meaning of the said clause.

In our view cl. (c) of s. 3(1) cannot bear the construction suggested by Mr. *Desai*. The clause is couched in simple and unambiguous language and in its plain meaning provides that it would be a good ground enabling a landlord to sue for eviction without the permission of the District Magistrate if the tenant has made or has permitted to be made without the landlord's consent in writing such construction which materially alters the accommodation or is likely substantially to diminish its value. The language of the clause makes it clear that the legislature wanted to lay down two alternatives which would furnish a ground to the landlord to sue without the District Magistrate's permission, that is, where the tenant has made such construction which would materially alter the accommodation or which would be likely to substantially diminish its value. The ordinary rule of construction is that a provision of a statute must be construed in accordance with the language used therein unless there are compelling reasons, such as, where a literal construction would reduce the provision to absurdity or prevent the manifest intention of the legislature from being carried out. There is no reason why

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the word "or" should be construed otherwise than in its ordinary meaning. If the construction suggested by Mr. *Desai* were to be accepted and the word "or" were to be construed as meaning "and" it would mean that the construction should not only be such as materially alters the accommodation but is also such that it would substantially diminish its value. Such an interpretation is not warranted for the simple reason that there may conceivably be material alterations which do not, however, diminish the value of the accommodation and on the other hand there may equally conceivably be alterations which are not material alterations but nevertheless would substantially diminish the value of the premises. It seems to us that the legislature intended to provide for both the contingencies and where one or the other exists it was intended to furnish a ground to the landlord to sue his tenant without having to obtain the previous permission of the District Magistrate. The construction of cl. (c) placed by the High Court is therefore not correct.

As regards the alterations, there is no dispute that the respondent carried them out without the permission of the appellants. The question then is whether they were such that they materially altered the accommodation as provided by cl. (c). Without attempting to lay down any general definition as to what material alterations mean, as such a question would depend on the facts and circumstances of each case, the alterations in the present case must mean material alterations as the construction carried out by the respondent had the effect of altering the form and structure of the accommodation. The expression "material alterations" in its ordinary meaning would mean important alterations, such as those which materially or substantially change the front or the

structure of the premises. It may be that such alterations in a given case might not cause damage to the premises or its value or might not amount to an unreasonable use of the leased premises or constitute a change in the purpose of the lease. The High Court however seems to have relied on *Hyman v. Rose* (1) where relief against forfeiture of lease was granted *inter alia* on the ground that the alterations carried out by the lessee had not done any harm to any one and the reversioner was in no way injured. But the question there was one of interpretation of a covenant contained in the lease and whether the alterations constituted waste. The leased premises were intended originally and were used as a chapel but on the leasehold being sold the assignees made the alterations complained of as they desired to use the premises as a cinema theatre. On these facts and the terms of the lease, the House of Lords held that in view of the fact that the lease did not prohibit the contemplated user of the premises as a cinematograph theatre, the alterations in the circumstances of that case did not constitute any breach of the covenant and since the purchasers of the leasehold had offered as a condition of obtaining relief against forfeiture to deposit a sum of money to secure the restoration of the premises to their original condition at the end of the lease relief ought to be granted on the terms so offered. This decision in our view cannot be of assistance. As an illustration as to what a structural alteration means some assistance can be had from the decision in *Wates v. Rowland* (2) though it was a case of interpretation of s. 2(1)(a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The Court of Appeal there found that whereas substitution of a tiled floor for a wooden floor which had become rotten owing to rise in the water level in the land fell within the description of "repairs" within the meaning of s. 2(1)(a), the laying of

(1) 1912 A.C. 623.

(2) 1903 1 Ch. 158.

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the additional concrete bed provided the house with a better substratum than it had before and was an improvement or a structural alteration of the house within the meaning of the said section. Similarly in *Bickmore v. Dimmer* (1) Lord COZENS-HARDY, L. J. construing a covenant against alterations in a lease, made a distinction between alterations intended for the proper user of lease premises and material alterations observing that some limitation must be put on the word "alteration" in such a covenant and that it could not be applied to a change in the wall paper of a room or to the putting up of a gas-bracket, or the fixing of an electric bell, though in fixing it some holes might have to be made in the wall and that the covenant should be limited to something which alters the form or structure of the building.

Lowering the level of the ground floor by about $1\frac{1}{2}$ ft. by excavating the earth therefrom and putting up a new floor, the consequent lowering of the front door and putting up instead a larger door lowering correspondingly the height of the *chabutra* so as to bring it on the level of the new door-step, the lowering of the base of the staircase entailing the addition of new steps thereto and cutting the plinthband on which the door originally rested so as to bring the entrance to the level of the new floor are clearly structural alterations which are not only material alterations but are such as to give a new face to the form and structure of the premises. In this view the construction carried out by the respondent must fall within the mischief of clause (c) and entitles the appellants to maintain their suit for eviction without the permission of the District Magistrate and to a decree for eviction. Both the contentions urged by Mr. *Desai* must therefore fail.

In our view, the High Court was in error in allowing the appeal of the respondent only on the ground that the

said alterations did not appear to have caused any harm to the premises or that there was no such finding by either of the two courts below. The basis of the High Court's judgment was on the interpretation which it sought to put on cl. (c), an interpretation commended by Mr. *Desai* for our acceptance. As already stated, even if the alterations did not cause any damage to the premises or did not substantially diminish their value they were material alterations and on that basis alone the appellants were entitled to evict the respondent.

We therefore allow the appeal, set aside the judgment and decree passed by the High Court and restore the judgment and decree passed by the First Additional Civil Judge, Varanasi, whereby he directed the eviction of the respondent. The respondent will pay to the appellants their costs throughout.

Appeal allowed.

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SUPREME COURT

APPELLATE CIVIL

*Before the Hon'ble Mr. Justice K. N. Wanchoo, and the
Hon'ble Mr. Justice Mitter.*

SMT. CHANDRA MOHINI SRIVASTAVA

APPELLANT

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October, 13.

v.

AVINASH PRASAD SRIVASTAVA AND ANOTHER
RESPONDENTS

(ON APPEAL FROM THE HIGH COURT AT
ALLAHABAD)

Hindu Marriage Act (25 of) 1955, ss. 10(1)(b) and (f), 13(viii) and 15—*Hindu Marriage (U. P. Sanshodhen Adhinyam)* (XIII of) 1962, s. 13(viii)—*Decree of divorce on the ground of exceptional hardship or depravity in the absence of any decree for judicial separation—Whether valid—Cohabitation after knowledge of adultery—Whether constitutes condonation so as to defeat claim for judicial separation—Remarriage after decree of divorce during pendency of petition for leave to appeal in Supreme Court—Whether a bar to grant or ground for revocation of leave to appeal.*

Sub-cl. (viii) of s. 13(1) of the Hindu Marriage Act as amended in his application to U. P. comes into operation after a decree for judicial separation and may be availed of only when after such a decree either of the two conditions (a) or (b) of that sub-clause is fulfilled. No decree of divorce can be passed simply on the fulfilment of condition (b) without there being in existence a decree for judicial separation.

Cohabitation with the wife even after the knowledge that she had been guilty of cohabitation with another person would be sufficient to constitute condonation within the meaning and for purposes of s. 10(1)(b) of the Hindu Marriage Act so as to disentitle the husband to a decree for judicial separation.

Even though s. 15 of the Act aforesaid (allowing parties to remarry if there is no right of appeal etc.) may not apply in terms or render unlawful a remarriage in view of the fact

that no appeal as of right lay to the Supreme Court, it is nonetheless necessary for the parties to make sure before remarriage that no special leave petition has been filed or pending in the Supreme Court and one could not by remarriage immediately after the High Court's decree deprive the other of the chance to present or prosecute appeal to Supreme Court.

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Civil Appeal No. 138 of 1966 from the Judgment and Order of the Allahabad High Court in First Appeal No. 289 of 1961 decided on 7th January, 1964.

J. P. Goyal and *M. V. Goswami*, for the Appellant.

S. P. Sinha, (*Champat Rai*, *E. C. Agarwala* and *P. C. Agarwala* with him), for Respondent No. 1.

The following Judgment of the Court was delivered by—

WANCHOO, J.:—This is an appeal by special leave against the judgment of the Allahabad High Court and arises in the following circumstances. A suit was brought by the first respondent, Avinash Prasad Srivastava, against the appellant for dissolution of his marriage with her and the grant of a decree of divorce. In the alternative the first respondent prayed for a decree of judicial separation. His case was that he was married to the appellant on 27th May, 1955, and the appellant lived with him for four years and a half. The parties last resided together and cohabited at Bareilly. A number of allegations of all kinds were made in the petition by the first respondent against the appellant; but it is unnecessary to refer to them, for the first respondent had to bring his case under one or other clause of s. 13 of the Hindu Marriage Act, no. 25 of 1955 (hereinafter referred to as the Act), if he wanted a decree of divorce, and under one or other clause of s. 10 if he wanted a decree of judicial separation. It is enough to say that the first respondent's case so far as the prayer for divorce was concerned was based upon cl. (i) of

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s. 13(1), namely, that the appellant was living in adultery, and in the alternative, on cl. (viii) of s. 13(1) read with s. 2 of the Hindu Marriage (Uttar Pradesh Sanshodhan) Adhiniyam, No. XIII of 1962. As to judicial separation, the case apparently was based on cl. (b) of s. 10(1), namely, that the first respondent had been treated with cruelty within the meaning of that section, and also on cl. (f) of s. 10(1).

The appellant denied that she had been living in adultery. She also denied that she ever had sexual intercourse with Chandra Prakash Srivastava, who was made a co-respondent in the petition. She also denied that she was guilty of any cruelty as alleged. On these pleadings, two main issues arose, namely—(i) whether the appellant had been living in adultery or had sexual intercourse with Chandra Prakash Srivastava after her marriage, and (ii) whether she had treated the first respondent with such cruelty as to bring the case within cl. (b) of s. 10(1). There were other issues as to jurisdiction and as to some property the return of which the first respondent was claiming, but we are not concerned with them now.

The trial court held that the appellant was not living in adultery. It also held that it was not proved beyond doubt that there was any sexual intercourse between the appellant and Chandra Prakash Srivastava at any time. It further held that even if there had been any sexual intercourse it had been condoned. Finally it held that no such cruelty as came within the meaning of s. 10(1)(b) had been proved. In consequence the petition was dismissed and the prayer for dissolution of marriage or in the alternative, for judicial separation, was refused.

The first respondent then went in appeal to the High Court. The High Court held that it had not been

proved that the appellant had been living in adultery within the meaning of s. 13(1)(i) of the Act. An attempt was made by the first respondent to prove illicit intimacy between the appellant and Chandra Prakash Srivastava in May or June 1958, but that was not believed either by the trial court or by the High Court. But the High Court relying on two letters alleged to have been written by Chandra Prakash Srivastava to the appellant held that there had been sexual intercourse between the appellant and Chandra Prakash Srivastava in 1955. The High Court also held that there was no condonation by the first respondent of this adulterous intercourse. It was therefore of opinion that the first respondent would be entitled to claim judicial separation under s. 10(1)(f) of the Act. However, using the U. P. amendment to s. 13(1)(viii), the High Court held that this was a case where dissolution of marriage was necessary. The appeal therefore was allowed and dissolution of marriage was granted by the High Court. It may be added that on the question of cruelty, the High Court held that there was no such cruelty as might come within the meaning of s. 10(1)(b). Thereupon the appellant obtained special leave, and that is how the matter has come up before us.

Before we deal with the merits of the appeal, we may refer to an application (CMP No. 2935 of 1966) filed on behalf of the first respondent, in which he prays that the special leave granted to the appellant be revoked. The grounds taken for revocation of special leave are that the High Court granted divorce to the first respondent and ordered that its decree should take effect forthwith, with the result that the marriage between the appellant and the first respondent stood dissolved on 7th January, 1964, when the High Court allowed the appeal. The special leave petition was presented in this Court on 7th April, 1964, and the appellant did not convey to the first respondent that she was intending to challenge the deci-

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sion of the High Court. She also did not pray for the stay of operation of the order of the High Court. The first respondent therefore believed that she had submitted to the order of the High Court and married another woman on 2nd July, 1964. Special leave was granted to the appellant by this Court on 25th August, 1964, and it was only on 9th September, 1964, when the first respondent got notice of the grant of special leave that he came to know that the judgment of the High Court was under appeal in this Court. In the meantime he had already married another woman and a son was born to that woman on 20th May, 1965. The first respondent therefore contended that because of the negligence of the appellant in not informing him that she was applying to this Court for special leave, he had married again and his new wife had given birth to a son, and in consequence this Court should now revoke the special leave that was granted so that the new child might not become illegitimate.

The application has been opposed on behalf of the appellant and it is contended that it was no part of her duty to inform the first respondent that she was intending to apply to this Court for special leave. It was also contended that it was for the first respondent to make sure before marrying that no further steps had been taken by the appellant after the judgment of the High Court, and in this connection she relied on ss. 15 and 28 of the Act. In any case it is urged that the fact that the first respondent took the risk marrying without making sure whether any further steps had been taken by the appellant was no ground for revocation of special leave. It was also pointed out that though the first respondent had been served as far back as 9th September, 1964, he made the application for revocation of special leave only on 15th September, 1966, when the appeal was ready for hearing.

We are of opinion that special leave cannot be revoked on grounds put forward on behalf of the first respondent. S. 28 of the Act *inter alia* provides that all decrees and orders made by the court in any proceedings under the Act may be appealed from under any law for the time being in force, as if they were decrees and orders of the court made in the exercise of its original civil jurisdiction. S. 15 provides that "when a marriage has been dissolved by a decree of divorce and there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again;" These two sections make it clear that where a marriage has been dissolved, either party to the marriage can lawfully marry only when there is no right of appeal against the decree dissolving the marriage or, if there is such a right of appeal, the time for filing appeal has expired without an appeal having been presented, or if an appeal has been presented it has been dismissed. It is true that s. 15 does not in terms apply to a case of an application for special leave to this Court. Even so, we are of opinion that the party who has won in the High Court and got a decree of dissolution of marriage cannot by marrying immediately after the High Court's decree and thus take away from the losing party the chance of presenting an application for special leave. Even though s. 15 may not apply in terms and it may not have been unlawful for the first respondent to have married immediately after the High Court's decree, for no appeal as of right lies from the decree of the High Court to this Court in this matter, we still think that it was for the first respondent to make sure whether an application for special leave had been filed in this Court and he could not by marrying immediately after the High Court's decree deprive the

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appellant of the chance to present a special leave petition to this Court. If a person does so, he takes a risk and cannot ask this Court to revoke the special leave on this ground. We need not consider the question as to whether the child born to the new wife on 20th May, 1965, would be legitimate or not, except to say that in such a situation s. 16 of the Act may come to the aid of the new child. We cannot therefore revoke the special leave on the grounds put forward on behalf of the first respondent and hereby dismiss his application for revocation of special leave.

Turning now to the merits of the appeal, we have already indicated that the High Court as well as the trial court are agreed that the appellant was not living in adultery at the time when the petition was filed. They are also agreed that there was no such cruelty as would bring the case within the meaning of s. 10(1)(b) of the Act. But the High Court found that there had been adultery between the appellant and Chandra Prakash in 1955 and the evidence for that consisted of two letters said to have been written by Chandra Prakash to the appellant. We cannot agree with this conclusion of the High Court. Chandra Prakash was married to a cousin of the appellant. He was therefore not a stranger to the appellant and his writing letters to her would not therefore be a matter of any surprise. We cannot also forget that the appellant in her statement has denied on oath that she ever had illicit connection with Chandra Prakash. There is also no doubt that the attempt of the first respondent to prove that there had been illicit intimacy between the appellant and Chandra Prakash in May/June 1958 has failed and both the courts have disbelieved the evidence in this behalf. It is in this background that we have to examine the two letters on which reliance has been placed by the High

Court, that being the only evidence in proof of adultery in 1955.

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It is true that the appellant has denied receiving those letters and has also denied that she ever sent any letters to Chandra Prakash. One can understand this denial in the case of a person like the appellant who was facing a petition for divorce on the ground of adultery. But assuming that those two letters were received by the appellant, that does not in our opinion prove that there was any adultery between the appellant and Chandra Prakash in 1955. We have read those letters and we must say that they are most improper and should not have been written by a person like Chandra Prakash who was married to the cousin of the appellant. But the first thing that strikes us is that the mere fact that some male relation writes such letters to a married woman, does not necessarily prove that there was any illicit relationship between the writer of the letters and the married woman who received them. The matter may have been different if any letters of the appellant written to Chandra Prakash had been proved. Further there is intrinsic evidence in the letters themselves which shows that whatever might have been the feelings of Chandra Prakash towards the appellant, they were not necessarily reciprocated by the appellant. In Ex. 2, Chandra Prakash wrote to the appellant. "You love me as you love others and this is why my share is very small. You write me letters to satisfy your anger". This seems to suggest as if Chandra Prakash was getting no response from the appellant. Again in Ex. 3, Chandra Prakash wrote. "I know that you would be angry with me, but what can I do". This again suggests that Chandra Prakash was getting no response from the appellant. Further in both these letters Chandra Prakash conveyed his respects to the appellant's husband, and on the whole we are not satisfied

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that these letters indicate that there must have been sexual intercourse between the appellant and Chandra Prakash in 1955, which was the time when these letters were written. When we have the clear denial of the appellant to the effect that she never had any sexual intercourse with Chandra Prakash, we have no hesitation in accepting that denial, for there is nothing in these letters which would even suggest that the denial was false. Nor does the evidence of the first respondent, once the incident of May/June 1958 has been disbelieved, show anything from which it can be inferred that there was any illicit relation between the appellant and Chandra Prakash in 1955 or at any other time. We are therefore in agreement with the trial court that these letters do not show that there was any illicit relationship between the appellant and Chandra Prakash in 1955.

We are further of opinion that even assuming that these letters indicate that there was some illicit intimacy between the appellant and Chandra Prakash, the High Court was still in error in granting divorce under s. 13(1)(viii) as amended by the U. P. amendment. By the U. P. amendment, the following clause was substituted for cl. (viii) in the Act and was deemed always to have been substituted:

“(viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party and—

(a) a period of two years has elapsed since the passing of such decree, or

(b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the other party.”

As we read this provision, it is clear that before a decree for divorce can be granted thereunder, there must first be a decree for judicial separation and thereafter under the amendment a decree for divorce will follow if one of two conditions is satisfied, namely that (i) a period of two years has elapsed, or (ii) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the other party. Sub-cl. (b) in our opinion is not independent. That sub-clause only comes into operation after a decree of judicial separation has been passed. We cannot accept the contention that it is open to a court under the amended provision to grant a decree of divorce on the ground of exceptional hardship to the petitioner or of exceptional depravity on the part of the other party, even without a decree of judicial separation having been first made. Sub-cl. (b) can only apply after a decree for judicial separation has been passed and it is not open to a court to apply that clause and give a divorce forthwith as has been done in this case on the assumption that a decree of judicial separation could have been passed on the ground mentioned in s. 10(1)(f). We are clearly of opinion that the amended clause [namely, cl. (viii) of s. 13(1)] still requires first a decree of judicial separation and thereafter a decree of divorce may follow under cl. (b) without waiting for two years, which is the necessary period for the application of cl. (a). The High Court therefore was not right in passing the decree of divorce in this case forthwith under sub-cl. (b) of s. 13(1)(viii) as amended in U. P.

It has however been urged on behalf of the first respondent that we may now pass a decree of judicial separation instead of a decree of divorce passed by the High Court. We are of opinion that even that cannot be done in the present case. The only ground on which the decree of judicial separation can now be

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asked for is that mentioned in s. 10(1)(f), namely that the appellant had sexual intercourse with any person other than her husband after the marriage. The only allegation in that respect was that the appellant had sexual intercourse with Chandra Prakash in 1955, and that is sought to be proved by the two letters to which we have referred already. We have held that those letters do not prove that there was any sexual intercourse between the appellant and Chandra Prakash in 1955. Therefore, there is no ground even for a decree of judicial separation in favour of the first respondent.

Besides even if we were of opinion that there had been sexual intercourse between the appellant and Chandra Prakash in 1955 (which we have no doubt is not true) this would be a case of condonation under s. 23(1)(b) of the Act. Under that provision a decree of judicial separation cannot be passed under s. 10(1)(b), if it appears to the court that the petitioner has in any manner been accessory to or connived at or condoned the act or acts complained of. In his statement under O. X, r. 2 of the Code of Civil Procedure, the first respondent stated that it was in the month of June or July 1955 or 1956 that illicit relations of the appellant with Chandra Prakash were confirmed to him. According to that statement the first respondent knew even in 1955 or 1956 that there had been adultery between the appellant and Chandra Prakash. Even so, the first respondent continued to live with the appellant and a son was born to them in 1957. In his evidence the respondent tried to resile from his statement made under O. X, r. 2 and said that what he meant was that in 1955/1956 he entertained suspicion only. This explanation is of course untrue, for the words used in the statement under O. X, r. 2 were that illicit relations between the appellant and Chandra Prakash were confirmed to him. Even in his evidence the first respon-

dent stated that he was definite in May/June 1958 that there was illicit connection between the appellant and Chandra Prakash. It was admitted by the first respondent that he had sexual relations with the appellant right up to October, 1958. It is only in February, 1959 when the appellant came finally to live with the first respondent that he said that he had no sexual relations with her during her stay of fifteen days. He also admitted that even after May/June 1958 he was willing to keep the appellant at the instance of his friends.

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Reliance in this connection is placed on *Perry v. Perry* (1) as to the content of condonation, which involves forgiveness confirmed or made effective by reinstatement. That was however a case of desertion. It is urged that in order that forgiveness may be confirmed or made effective, something more than stray acts of cohabitation between husband and wife have to be proved. But where as in this case, judicial separation is being claimed on the ground of s. 10(1)(f), the fact that the husband cohabited with the wife even after the knowledge that she had been guilty of cohabiting with another person would in our opinion be sufficient to constitute condonation, particularly, as in this case, the first respondent knew of the alleged adultery in May/June 1958 and still continued to cohabit with the appellant thereafter up to October 1958. Further the statement of the first respondent to the effect that he kept his wife after May/June 1958 at the instance of his friends is a clear indication of condonation even in the sense of forgiveness confirmed or made effective by reinstatement. We are therefore of opinion that the first respondent is not even entitled to a decree of judicial separation.

(1) (1952) 1 All. E.R. 1076.

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We therefore allow the appeal, set aside the order of the High Court and restore that of the trial court rejecting the petition of the first respondent. The appellant will get her costs throughout from the first respondent.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Verma and Mr. Justice R. Prasad
OM PRAKASH GUPTA ... APPELLANT

THE STATE OF UTTAR PRADESH

RESPONDENT

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Government of India Act, 1935, ss. 59 and 240—Order of dismissal from Chief Secretary not expressed to be in the name of the Governor though authenticated—Validity of the order—If can be proved to be really in the name of the Governor—Appointment by the Governor—Dismissal, if could be ordered by Premier after Independence—Power of, if could be delegated—Effect of Independence Act on non-covenanted services—Secretariat instructions under s. 59, Government of India Act, if can affect the provisions of s. 240(2) of the Act.

Enquiry—Enquiry against Government servant—Enquiring Officer not shown to be appointed by punishing authority—Effect on enquiry—Opportunity to show-cause—Several charges—Omission to supply copy of the charge on which dismissal ordered—Opportunity to cross-examine—Volunteered statement of witness—Made use of, if denial of opportunity—Opportunity given at second stage not availed of—Omission of opportunity at first stage—Effect.

Salary—Calculation of—Crossing of efficiency bar and increments, if to be considered—

Evidence—Official documents not formally produced—No privilege claimed—Party producing, if can refuse to file—Court, if can look into it.

Admission—Plaint allegation not denied in written statement—If to be deemed admitted—Civil Procedure Code, 1908, O. VIII, r. 5.

Where an order of dismissal emanating from the Chief Secretary is not expressed to be in the name of the Governor can be proved to be made by the Governor as the question relates to the substance of the order and not only to its form. Such an order, though authenticated would not be valid if not expressed to be in the name of the Governor.

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Delegation of authority to appoint and consequently to dismiss to subordinate authority though is not illegal, but where actually the appointment was made by the Governor, then in spite of subsequent delegation of the power of appointment and dismissal, the power to dismiss rested with the Governor. The object of s. 240(2) of the Government of India Act cannot be allowed to be defeated by recourse to such delegation of power. Such a delegation of power to dismiss an employee appointed by higher authority is repugnant to s. 240(2) and is, therefore, unconstitutional. Consequently where an appointment was made by the Governor, the Premier on subsequent delegation of power cannot order the dismissal. Rule framed under s. 59 of the Act cannot be violative of s. 240(2) of the Act.

Where it has not been shown that enquiring officer was appointed by the punishing authority or under his authority, or that the charges were framed by competent authority or under his authority or that the suspension order was passed by competent authority or notices were issued by him, the enquiry would be vitiated.

The failure to give copy of the findings on the charge on which the dismissal was made is denial of opportunity. So also where the employee was not allowed to cross-examine a witness on his volunteered statement relied on by the enquiry officer.

Where an enquiry is invalid on the ground of failure to prove that competent authority took the various steps leading up to the order of dismissal the nature of the infirmities in the enquiry and the order of dismissal go to the root of the matter and cannot be deemed to have been waived by an omission to show cause at the second stage.

Allegations made in the plaint where not denied shall be deemed to have been admitted under O. VIII, r. 5, C. P. C.

The only contingency under a document may not be produced in Court is the one relating to privileged documents. In the absence of any claim to privilege no party could say that such document would not be filed in court. The use of such document by the Court is improper.

P. Joseph John v. State of Travancore and Cochin (1) distinguished.

Case-law discussed.

First Appeal No. 170 of 1962 against the order and decree of R. K. Misra, II Addl. Civil Judge, Allahabad, in Civil Suit No. 15 of 1953 decided on 29th April, 1960.

(1) A.I.R. 1955 S.C. 160.

Gyan Prakash, for the Appellant.

Standing Counsel, for the Respondent.

The following judgment of the Court was delivered by—

R. PRASAD, J.:—This is a plaintiff's first appeal from the judgment of Sri R. K. Misra, 2nd Additional Civil Judge, Allahabad, dated 29th April, 1960 in civil suit no. 14 of 1953.

The allegations made in the plaint *inter alia* are that the plaintiff became successful in the U. P. Civil Service (Executive) competition, and on 20th June, 1940, he joined the service and was confirmed in due course. He was posted at Dehra Dun. On account of political disturbances in the year 1942, in discharge of his duties, he had to acquit or discharge persons against the wishes of the Government, that was then in power. The District Magistrate of Dehra Dun gave an entry of "anti police bias" in the plaintiff's character roll, and he was thereafter transferred to Ballia. The District Magistrate of Ballia also was displeased with him and in his turn, he also gave an adverse entry in the character roll of the plaintiff. Plaintiff fell ill at Ballia and applied for leave, but no leave was granted to him. He was telegraphically transferred to Lakhimpur-Kheri where he joined on 20th July, 1944. At Lakhimpur-Kheri, he came to know that some sort of secret enquiry was being made against him by the Deputy Commissioner. The Deputy Commissioner did not hear the plaintiff properly and on 20th August, 1944, he made a report against the plaintiff. The next day, however, the Deputy Commissioner sent a D. O. to the Commissioner that the scandal against the plaintiff was false and was not borne out by evidence. This second report was, however, ignored by the Commissioner and the Commissioner consulted the Government on the

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basis of the first report. The Government put the plaintiff under suspension as from 23rd August, 1944 pending an enquiry into his conduct. He was informed by the Deputy Commissioner on 26th August, 1944 that the enquiry against him was being conducted under rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930. On the 27th August, 1944, a charge-sheet was given to the plaintiff at Lakhimpur-Kheri which did not contain any allegations of fact. He was also directed to see the Commissioner at Lucknow on 28th August, 1944. When the plaintiff met the Commissioner at Lucknow on 28th August, 1944, he represented to him that the time given to the plaintiff to submit his reply was very short, and that a copy of the allegations made against him had not been given to him. The plaintiff, therefore, was unable to make his defence. The plaintiff, however, claimed an open enquiry with a view to establish that he was not guilty of any misbehaviour. The Commissioner proceeded to record his statement without giving any document or statement of allegations to him. The Commissioner then showed to the plaintiff English translation of the statements of witnesses recorded by the Deputy Commissioner and the plaintiff was asked to submit his written remarks on the statements by 1st September, 1944. On 29th August, 1944, plaintiff asked for the copies of the statements and also asked for sometime to file written remarks. No time was granted to the plaintiff and he was asked to see the Commissioner on 1st of September, 1944 at Lucknow. Copies of the statements asked for were not given to the plaintiff and he was made to file his written remarks in the presence of the Commissioner on the same day. The enquiry closed on the 1st September, 1944, and a report was thereafter submitted to the Government. On the 7th September, 1944, the plaintiff was informed at Allahabad by means of telegram

that the Commissioner wanted to see the plaintiff on the 11th September, 1944 at Lucknow. When the plaintiff saw the Commissioner as directed, the plaintiff was asked whether he wanted to cross-examine the witnesses and to produce his own evidence in defence. The plaintiff, however, made an application on the same day pointing out that the procedure prescribed under r. 55 was not being followed in this case, and that, therefore, the entire proceeding was illegal. Copies of relevant papers had not been given to him. It was also said in the application that the Commissioner who was holding the enquiry was prejudiced against the plaintiff and that it was proper that further enquiry be not made by him. The reports or the D. Os. of the Deputy Commissioner, dated 20th August, 1944 and 21st August, 1944 had not been shown to the plaintiff, nor were the D. O. of the Commissioner to the Chief Secretary, and the note of the Chief Secretary, to the Governor, for initiating the enquiry against the plaintiff, shown to him. It also appeared to the plaintiff that his past record was being associated with the charges made against him. The Commissioner directed that the copies of the depositions would be furnished to the plaintiff and the plaintiff was asked to appear before the Commissioner on the 13th September, 1944 and to inform the Commissioner as to which of the witnesses, the plaintiff desired to cross-examine and what witnesses he proposed to produce in his defence. The English translation of the depositions referred to above contained serious mistakes. Plaintiff was not allowed to go to Lakhimpur-Kheri to contact his defence witnesses. Nor was he permitted to take the help of counsel at Kheri. Plaintiff, however, appeared before the Commissioner and all the witnesses except two of them were summoned for cross-examination. Some witnesses for defence were also summoned. On the 22nd September, 1944,

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enquiry commenced at the bungalow of the Commissioner. The plaintiff was asked to cross-examine the witnesses, whose statements had not been recorded in his presence. The record of the case was not properly maintained by the Commissioner, and the plaintiff drew the attention of the Commissioner to the matter on the 24th September, 1944. A site-plan of the plaintiff's house at Kheri was got prepared by the Commissioner, but the plaintiff was not allowed to make his representation before the Commissioner, who made a report against the plaintiff on the 30th September, 1944. The finding of the Commissioner, put shortly, was that the conduct of the plaintiff could not be tolerated even if immoral acts had not been proved. Plaintiff's case was then referred to the Public Service Commission, which had already been informed that His Excellency the Governor had decided to dismiss the plaintiff from service. On 1st December, 1944, the plaintiff was served with an order at Allahabad, which purported to dismiss him from service with effect from 25th November, 1944. A memorial submitted by the plaintiff to His Excellency, the Governor, for review of the order was rejected on 20th May, 1947.

The plaintiff then proceeded to file original suit no. 1 of 1948 and on 4th December, 1948, plaintiff's suit was partly decreed. The order of dismissal was set aside on the ground that the plaintiff was not given any opportunity to show cause against the punishment proposed to be awarded to him. Following the aforesaid decision, the U. P. Government set aside the order of plaintiff's dismissal, dated 25th November, 1944, by a letter, dated 12th April, 1949. At the same time the U. P. Government gave notice, dated 11th April, 1949, directing the plaintiff to show cause why he should not be dismissed from service on the finding of the Commissioner recorded against him. Plaintiff .

had also claimed the relief in suit no. 1 of 1948 for recovery of arrears of his pay. That relief was not granted to the plaintiff by the trial court. So the plaintiff had filed an appeal against that part of the decree in this Court, which was registered as first appeal no. 141 of 1949. The plaintiff was advised that during the pendency of the aforesaid first appeal, no such notice as was sent by the U. P. Government could be given nor the same could be replied to.

On the 1st September, 1949, once more the plaintiff was informed that he had been dismissed from service with effect from 30th August, 1949. The plaintiff, therefore, proceeded to file the suit giving rise to the present appeal. Plaintiff further alleged that the order of dismissal, dated 30th August, 1949 was quite wrong for the various reasons given in para 87 of the plaint. The plaintiff alleged that the first enquiry was not made in accordance with the rules and it was made by a biased person, who took extraneous matters into consideration.

With regard to the order of dismissal, dated 30th August, 1949, it was said that the Chief Secretary had no power to dismiss the plaintiff and that there was no order in the name of or by the order of Governor, ordering the dismissal of the plaintiff from service. The plaintiff did not get reasonable opportunity to make his submissions either against the proposed punishment or against the findings of the enquiry officer. The plaintiff claims to be entitled to receive his full salary with interest including the increments from 30th August, 1949 to 31st October, 1952, the time when the plaint was registered and also future salary. The plaintiff has also sought a decree declaring that the order of dismissal from service, dated 30th August, 1949 made against the plaintiff is illegal, wrongful, void and inoperative and that the plaintiff continued to remain a

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member of the Provincial Civil Service (Executive Branch).

The plaintiff has sought further declarations to the effect that no reasonable opportunity had been afforded to him in the enquiry made by Mr. Bishop in 1944, a declaration that the plaintiff is political sufferer; a declaration that the plaintiff is entitled to his full pay with all its increments, just as if he were discharging his duties honestly and efficiently; a decree for arrears of salary from 30th August, 1949 to 31st October, 1952 with interest amounting to Rs.24,592 and a decree for future salary from 1st November, 1952 onwards in the grade of Rs.640—30—700—50—850 with increments falling on each 1st of November was also sought. The plaintiff further sought a decree for recovery of damages amounting to Rs.25,408 if salary was granted to him separately or Rs.50,000 if salary was not granted to him separately. *Pendente lite* and future interest at 4 per cent as provided by r. 185, Financial Handbook and r. 776, Civil Service Regulation was also prayed for.

The plaint filed by the plaintiff consists of 103 paras which are followed up by mention of reliefs sought by the plaintiff.

The suit was contested by the defendant, namely, the State of Uttar Pradesh. After admitting or denying the various paragraphs of the plaint, the written statement contained only six short paragraphs by way of additional pleas. These paragraphs are numbered as 101 to 106. Para 101 of the written statement, which is the first paragraph under the heading "Additional Pleas" asserts that reasonable opportunity to defend himself was given to the plaintiff before he was dismissed from service. The second additional plea as contained in para 102 is that the provisions of r. 55 of the Civil Services (Classification, Control and Appeal) Rules

and sub-s. (3) of s. 240 of the Government of India Act, 1935, were complied with before the plaintiff was dismissed from service, the third additional plea which is para 103 raises the plea that the question whether the plaintiff can recover the arrears of his salary by means of a suit has been decided by a court of competent jurisdiction, and that the question was barred by principles of *res judicata*. The fourth additional plea as contained in para 104 is that the suit was barred by r. 2 of O. 2 of the Code of Civil Procedure. The fifth additional plea (para 105 of the written statement) is that the suit regarding the recovery of arrears of salary and for damages was barred by limitation; and the sixth and the last additional plea (para 106 of the written statement) is that the suit for declaration that the plaintiff was a political sufferer was not cognizable by that Court.

The plaintiff filed a replication to the written statement of the defendant. The defendant filed an additional written statement, dated 10th April, 1958. This is again a very short document and all that it says is that the plaintiff was given full opportunity to show cause against the proposed order of punishment which included an opportunity to assail the finding of the enquiry officer. It further said that the order setting aside the plaintiff's dismissal which was made in pursuance of the judgment in suit no. 1 of 1948, dated 4th December, 1948, was made on the same date when a fresh notice was issued to the plaintiff asking him to show cause why he should not be dismissed from service. The defendant did not act maliciously. What was further said in the additional written statement was that even though oath may not have been administered to some of the witnesses in the departmental enquiry, that did not vitiate the trial of the plaintiff.

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On the pleadings of the parties, the trial court framed the following issues :

1. Whether the order, dated 30th August, 1949 dismissing the plaintiff from service is illegal, void and inoperative for any of the grounds mentioned in para 87 of the plaint. If so, its effect ?

2. Whether the plaintiff's claim for arrears of salary is legally maintainable ?

3. Whether the plaintiff is entitled to any arrears of salary as claimed by him ? If so, to what amount ?

4. (a) Whether the plaintiff was not given any reasonable opportunity to show cause against the charges in the enquiry held by Mr. Bishop in 1944, as alleged by him ? If so, to what effect ?

(b) Whether the plaintiff was not given reasonable opportunity to show cause against the punishment proposed to be given to him under notice, dated 11th April, 1949, as alleged by him ? If so, its effect ?

5. To what relief, if any, is the plaintiff entitled ?

6. Whether the plaintiff is entitled to any damages ? If so, to what amount ?

7. Whether the plaintiff is a political sufferer as alleged by him ?

8. Whether this court can grant a declaration to this effect that the plaintiff is a political sufferer ?

On issue no. 8 the trial court came to the conclusion that a declaration that the plaintiff was a political

sufferer could not be granted by a court. On issue no. 7 court below referred to its findings on issue no. 8 and held that it was wholly unnecessary to record a finding on issue no. 7. On issue no. 6, which related to the plaintiff's right to damages, court below took the view that the plaintiff was not entitled to recover any damages from the defendant. On issue no. 2, it was conceded on behalf of the defendant that the plaintiff could be entitled to claim arrears of salary in view of the law as it was, at that time. The court below further returned the finding on issue no. 4(a) to the effect that reasonable opportunity was afforded to the plaintiff to show cause against the charges, in the enquiry held by Mr. Bishop in 1944. On issue no. 4(b), court below came to the conclusion that plaintiff was given reasonable opportunity to show cause against the proposed punishment. On issue no. 3, court below came to the conclusion that the plaintiff was not entitled to any arrears of salary in view of its finding on other issues. On issue no. 1, the finding of the trial court is that the order of dismissal of the plaintiff, dated 30th August, 1949 had not been proved to be invalid on any ground whatsoever. On issue no. 5, court below held that the plaintiff was not entitled to any relief at all.

As a result of its findings on the various issues, trial court dismissed the plaintiff's suit with costs.

It is necessary to refer to certain other relevant and undisputed facts at this stage. The learned Civil Judge, who tried the earlier suit, namely, suit no. 1 of 1948 filed by the plaintiff, had framed nine issues in that case. Those issues were as follows :

1. Has the Allahabad Court jurisdiction to try this suit ?

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2. After Mr. Bishop had submitted his final findings on the charges to the Government, was it necessary to inform the plaintiff the substance of these findings and then to give him a reasonable opportunity of showing cause against the proposed dismissal? If so what is the effect of this omission on the suit?

3. Was the plaintiff informed of the punishment proposed, the grounds on which it was proposed to take such action, and was given a reasonable opportunity after Mr. Bishop's final report of showing cause why the proposed punishment should not be imposed, as contemplated by s. 240 (3) Government of India Act, 1935?

4. Was any such opportunity given before the enquiry conducted by Mr. Bishop? How does that effect the rights of the parties?

5. Was there any failure to comply with the provisions of r. 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930?

6. Whether the proceedings held by Mr. Bishop, the record prepared by him and his findings thereon were defective, prejudiced, wrongful, unjust, improper and prejudicial to the plaintiff?

7. Did the Governor pass the order of dismissal? Does s. 59(2) of the Government of India Act, 1935, preclude the plaintiff from raising the point that the order of dismissal was never passed by the Governor?

8. Is the order of dismissal wrongful, illegal, void and inoperative, on the grounds mentioned in paras 8(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k) and (l) of the plaint?

9. To what relief, if any, is the plaintiff entitled? Is the amount of damages claimed excessive?

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During the course of the trial of that earlier suit, Pandit *Kanhaiya Lal Misra*, who appeared as counsel for the plaintiff and one *Maulvi Saiyed Sakhawat Ali* who appeared for the defendant, made a joint statement before the learned Civil Judge on 26th October, 1948 which was recorded by the court below in the following terms :

" Pandit *Kanhaiya Lal Misra*, pleader for the plaintiff and *Maulvi Saiyed Sakhawat Ali*, pleader for the defendant stated that the parties did not want to produce any oral evidence in respect of issues no. 1, 2 and 3. The pleader for the plaintiff also admitted that for purposes of issues no. 1, 2 and 3 it might be taken for granted that the decision of the remaining issues would be in favour of the defendants. "

The learned Civil Judge who decided that case observed in his judgment that he had heard issues 1 to 3 as preliminary issues at the desire of the parties. It was agreed by the plaintiff that for the purposes of recording findings on issues 1, 2 and 3, the rest of the issues 4 to 8 might be deemed to have been decided in favour of the defendant. The learned Civil Judge in that suit, came to the conclusion that no reasonable opportunity was given to the plaintiff within the meaning of s. 240, cl. (3) of the Government of India Act, 1935 to show cause against the action proposed to be taken in regard to him. He, therefore, held that the dismissal of the plaintiff from U. P. Civil Service was void and inoperative. In that judgment, observations were made as follows :

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"The order of dismissal has been considered void and inoperative not because there was something inherently wrong in the conduct of the enquiry against the plaintiff, but because the plaintiff was not given any reasonable opportunity of showing cause against the proposal to dismiss him from service after Mr. Bishop had submitted his finding. It may, therefore, still be open to the Government to give the plaintiff that opportunity now after the decision of this case. It would then be for the Government to decide after the plaintiff gets that opportunity as to whether or not he is to be retained in service. The Government may decide to reinstate him with full retrospective effect or with effect from some subsequent date which the Government may, in its discretion, think proper."

The relief that was granted to the plaintiff in the earlier suit was that it was declared that the order of dismissal passed against the plaintiff on 25th November, 1944 was void and inoperative, and the plaintiff remained a member of the U. P. Civil (Executive) Service on the date of the institution of the suit. Rest of the plaintiff's claim was dismissed. It was said that any further action by the Crown, that may have occurred since the raising of the action, was not covered by that suit.

We have already referred to the fact that the plaintiff had filed a first appeal from the decision in his earlier suit, which was registered in this Court as first appeal no. 141 of 1949. Essentially, the object in filing the aforesaid first appeal was to obtain a decree for arrears of salary and the refund of court-fee. A Division Bench of this Court which heard the appeal, dismissed the same on 6th November, 1950. The result of the decision of that first appeal was that the

plaintiff's claim for recovery of arrears of salary stood dismissed, although the plaintiff had succeeded in getting a declaration that the order of his dismissal was void and inoperative.

The plaintiff filed an appeal from the decision of this Court, in the Supreme Court, which appeal was decided by the Supreme Court on 21st April, 1955.

On the question, whether the plaintiff was entitled to a decree for recovery of arrears of salary after the order of his dismissal had been found to be void and inoperative, their Lordships of the Supreme Court made reference to the case of *State of Bihar v. Abdul Majid* (1) and held that there should be no question now that the appellant had the right to institute a suit for recovery of arrears of salary, as he was dismissed illegally. Another contention made by the Attorney General in the Supreme Court was that the order of suspension of August 1944, continued to subsist, although the order of dismissal had been declared illegal by the Civil Judge and that all that the appellant was entitled to was subsistence allowance, and not salary, so long as the order of suspension remained effective. It was noticed that no such plea had been taken in the written statement filed in the trial court, nor was any issue framed on that question. The Supreme Court, however, allowed the parties to file additional pleadings on that point, which was done and the appeal thereafter came for hearing again before the Supreme Court. The view taken by the Supreme Court was that with the order of dismissal, the order of suspension also lapsed. The order of dismissal replaced order of suspension, and suspension then ceased to exist. The subsequent declaration by a Civil Court that the order of dismissal was illegal, could not have

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the effect of reviving the order of suspension, which had ceased to exist.

In the memorandum of appeal filed in this case, the appellant has taken as many as 71 grounds.

One of the submissions made before us is that the order of dismissal, dated 30th August, 1949 is not an order, which has been made by the Governor, nor is the order expressed to be in name of or by the order of the Governor. The order of dismissal, proceeded from the Chief Secretary, who did not have power to order the dismissal of the plaintiff. Learned counsel for the appellant has submitted that on this consideration alone, plaintiff's suit is fit to be decreed even if the other contentions made on plaintiff's behalf do not succeed. We have, therefore, decided to proceed to consider this particular question first.

In para 87 of the plaint, it has been alleged that the order of dismissal is illegal, wrongful, void and inoperative on the grounds given in the said paragraph. As many as thirty grounds have been disclosed by the plaintiff in this context. 18th ground under para 87, is in the following terms :

"The order of dismissal proceeds from the Chief Secretary, who had no power to order dismissal. The order is not expressed to be in the name of or by the order of, the Governor."

The reply to para 87 as contained in the written statement filed by the defendant is as follows :

"84. The allegations made in para 87 of the plaint are repetition of what has been said in the previous paragraphs of the plaint and as such do not need any further reply."

We have already mentioned the six additional pleas taken in the written statement, but none of the said

six additional pleas related to the allegations made by the plaintiff in his plaint in para 87(18). We asked the learned counsel for the respondent to point out from the plaint if the plea mentioned in para 87(18) had been mentioned in any other part of the said document and whether there was any definite reply to that allegation in the written statement. The learned counsel has, however, not been able to point out either in the plaint or in the written statement anything similar to what has been said in para 87(18). The result is that although the plaintiff took expressly the ground which he has mentioned in para 87(18) of the plaint, the defendant has neither admitted nor denied the said allegation in the written statement and all that was said in the written statement was that the allegations made in para 87 of the plaint was repetition of what had been said in previous paragraphs of the plaint and as such do not need any further reply. With reference to the pleadings, therefore, it must be held that the allegation made in the plaint that the order of dismissal proceeds from the Chief Secretary, who had no power to order dismissal and that the order was not expressed to be in the name of, or by the order of the Governor, has not been denied, by the defendant in his written statement. This being so, it must be deemed that the averment made in para 87(18) is admitted by the defendant.

R. 5 of O. VIII of the Code of Civil Procedure, lays down as follows :

“ Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

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Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

The allegation of fact as contained in para 87(18) is that the order of dismissal proceeds from the Chief Secretary, and that the order is not expressed to be in the name of or by the order of the Governor. These allegations are allegations of fact, and consequently, covered by rule of law quoted above. It is a different matter that it may still be open to the defendant to urge that the order of dismissal, though it proceeds from the Chief Secretary, is a valid order of dismissal, or that though the order of dismissal is not expressed to be in the name of or by the order of Governor, the order of dismissal is a valid order. What is apparent is that the two allegations of fact made in para 87(18) not having been denied in the written statement, must be deemed to be admitted by the defendant.

The submission made on behalf of the plaintiff-appellant is that when he was appointed in the year 1940, it was the Governor of the State who was the appointing authority and it was the Governor who had actually made the plaintiff's appointment. The order of dismissal has not been made by the Governor, but by the Chief Secretary, an official subordinate in rank. The order of dismissal is wholly illegal and contrary to s. 240(2), Government of India Act, 1935.

The other submission made in this connection is that the impugned order of dismissal is neither expressed to be in the name of, nor by the order of the Governor as required by s. 59, Government of India Act, 1935. Consequently, the order is not valid.

It has, however, been urged on behalf of the respondent that inasmuch as the order in question bears

the signature of the Chief Secretary, it is a validly authenticated order, and it cannot be called in question on the ground that it is not an order made by the Governor. S. 59 of the Government of India Act provides as follows :

"59. (1) All executive action of the Government of a Province shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Provincial Government, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion."

Cl. (2) of s. 59 affords protection to orders expressed to be taken in the name of the Governor. If there is such an order, then its validity will not be questioned on the ground that it is not an order made by the Governor, provided it is authenticated in such manner as may be specified in rules to be made by the Governor. It is not in dispute that an order signed by the Chief Secretary is duly authenticated inasmuch as under r. 12 of the rules of the Executive Business made by the Governor, the Chief Secretary has the authority to make authentication of the order. In the instant case, however, the order has not been expressed to be

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taken in the name of the Governor. A copy of the order has been exhibited in this case and marked as Ex. 126. It is necessary to quote the entire order at this place :

“ Dismissal order dated 30th August, 1949.

GOVERNMENT OF THE UNITED PROVINCES
APPOINTMENT (A) DEPARTMENT

NOTIFICATION

Dated Lucknow, August 30, 1949

No. 4795/II-A—125-1948.—With effect from August 30, 1949, Sri Om Prakash Gupta, Deputy Collector, under suspension is dismissed from service.

BHAGWAN SAHAY,

Chief Secretary.

Copy forwarded for information to :

1. The Officer concerned.
2. The Commissioner, Lucknow—Faizabad Division.
3. The Accountant General, United Provinces.
4. The Superintendent, Printing and Stationery, United Provinces for publication in the next issue of the United Provinces *Gazette*.
5. The Director of Information for favour of release to the press.

By order,

K. P. BHARGAVA,

Secretary.

In view of the contents of the above order, the question of valid authentication and the consequent protection as provided for by cl. (2) of s. 59 does not arise. This, however, only lifts the bar against questioning the validity of the order. It may still be open to the State to prove by evidence that the order has really been made by the Governor. We have, therefore, to see if the defendant has adduced any evidence to prove that the order, though not expressed to be taken in the name of Governor, is really an order made by the Governor. The question whether the Governor has really made any such order is a question relating to the substance of the order and not only to its form.

Court below in this connection referred to the instructions issued by the Premier. R. 18 of the instructions, lays down in effect, that cases dealing with the dismissal of any officer of Provincial Service were to be submitted to the Premier by the Secretary of the department concerned, after consideration by the Minister incharge before the issue of orders. In this case, the Premier himself was incharge of appointments. The court below has observed that the papers were submitted to the Premier and he agreed to the dismissal of the plaintiff, and that thereafter, the order of dismissal was issued under the signature of the Chief Secretary. Therefore, according to the court below, the order was properly authenticated although it was not expressed in the name of the Governor. Even if it be assumed that at the time when the order of dismissal was made, the Premier himself was incharge of the appointment department, we are unable to agree with the view taken by the court below that it has been proved in this case that the Premier agreed to the dismissal of the plaintiff. There is absolutely no evidence to establish that part of the defendant's submission in this case.

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While discussing issue no. 4(b), court below has observed as follows :

"In the present case also, the Chief Secretary has signed this order on behalf of the 'Government of United Provinces, Appointment (A) Department' 'notification', and it has been proved that the satisfaction of the Hon'ble Premier, as the power was delegated to him by the Governor, under r. 14 had been obtained, and so the order is not invalid on this ground."

The learned counsel for the respondent informed us that although there is no evidence on the record to establish that the satisfaction of the Hon'ble Premier had been obtained, the court below looked into certain papers contained in the file relating to the plaintiff in the custody of the defendant, and from those papers, court below held that satisfaction of the Premier had been obtained. In his statement on oath, Chhotelal Sahu defendant's witness stated that he was the Assistant Superintendent, Appointment 'A' Department, that about the Government's confidential file of this suit, he had instruction that he should not produce it as an exhibit, but that the instruction was not that if the court wanted to see the same, it should not be shown to the court. At the time of his deposition, he had the file with him and he disclosed that the number of file was 125/1948. He had seen the file and notings on that file relating to proceedings by the Government in this case after the receipt of the report of the Commissioner. According to him, the Appointment 'A' Department was under the General Administration Portfolio, and that the portfolio was under the charge of the Chief Minister. He said that the file was placed before the Chief Minister and the dismissal order had been passed with the approval of the Chief Minister.

Before the order of dismissal was passed, the Public Service Commission was also consulted. In cross-examination, he said that the above file no. 125/1948 contained the old papers also relating to plaintiff's case, and he stated that he did not want to file the order of approval of the Chief Minister. He conceded that his statement relating to matters of the year 1949 was made after consulting the file, and that he had no personal knowledge about the same. He then said that he had orders in writing with him that the said record must not be filed as an exhibit in this case.

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It is this file which has been relied upon by the court below for its finding that the satisfaction of the Premier had been obtained before the order of dismissal was issued. The statement of Chhotey Lal Sahu defendant's witness was recorded by the court below on the 25th April, 1960. On the 29th April, 1960, plaintiff filed an application supported by an affidavit. In that affidavit the plaintiff averred that the evidence of the plaintiff in the case had finished on 25th April, 1960 and that the evidence of the defendant concluded the same day. 26th April, 1960 was fixed for argument, when the plaintiff opened his case, and thereafter argument of the defendant was heard. At the end of the argument, the defendant produced certain papers and file before the court, the contents of which were not disclosed to the plaintiff, but that the court looked into the file and read the documents. It was then said that the plaintiff had protested against the court's looking into the document of the defendant, which was not on the record of the case, but that the court did read the papers and did look into the document. In the circumstances, it was necessary that the plaintiff be given an opportunity to look into the file and the record which was seen by the court at the instance of

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the defendant, so that the plaintiff could produce evidence in rebuttal. It was then said in the affidavit that the defendant had also handed over a book called "Rules of Business", and that the court took the same for studying its provisions. The plaintiff wanted to challenge the provisions of that book, which were against him and that the court stopped him from doing so on the ground that the book was confidential and could not be shown to the plaintiff. The plaintiff then said in the affidavit that he had been greatly prejudiced by the abovementioned act of the defendant. The prayer made in the accompanying application is as follows :

"This Hon'ble Court may be pleased to direct the defendant to disclose to the plaintiff all the papers and documents which had been shown to the Hon'ble Court on 26th April, 1960 during arguments in the case, and to give the plaintiff an opportunity of producing evidence in rebuttal, and to pass such other or further orders as this Hon'ble Court may deem proper in the circumstances of the case.

(Sd.) HARI SWARUP,

Plaintiff's Counsel.

29-9-1960."

The short order made by the court below on that application may now be quoted and it is as follows :

"The judgment is about to be delivered and this is no stage for admitting fresh evidence. I had seen only the approval of the Hon'ble Premier in the confidential file and nothing more. File."

The procedure adopted by the court below in looking into the file and papers which were not part of the

record of the case ; in not directing those papers to be filed in a regular way as evidence in court ; in rejecting the prayer of the plaintiff made in the application mentioned above ; and finally in making use of those informations which the court derived from the perusal of those papers in deciding this case, is rather unusual, and perhaps not warranted by any provision of either the Code of Civil Procedure or the Indian Evidence Act. In case the State claimed privilege with regard to those documents, that matter should have been gone into by the court below and should have been properly decided. No claim of privilege appears to have been made on behalf of the defendant and the witness only acted upon some instructions which, according to him, he had received, and on the basis thereof, the witness asserted that he had orders not to file the papers in court. No party to a case, even though it be the State Government, is entitled to refuse to produce documents in court, and at the same time ask the court to use the contents of that document as evidence against the other party. The only contingency under which a document may not be produced in court, is the one relating to privileged documents. In the absence of any claim of privilege, no party could say that such document would not be filed in court.

It has been contended on behalf of the appellant that so far as the present record is concerned, there is no material or evidence to show that the satisfaction of the Premier had been obtained on the question of the dismissal of the plaintiff before the order of dismissal was issued, or to show that the order of dismissal was passed by the Premier. It was further contended that even on the file, which was wrongfully used by the court below against the plaintiff, there is no such material which will go to establish the above fact. It was then urged that this Court may get the file from

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the defendant and peruse the same to find out the correctness of the submission made on behalf of the plaintiff. In view of the submission made by the plaintiff's learned counsel we agreed to look into the file which the defendant's learned counsel was directed to produce. We have looked into the file relating to the dismissal of the plaintiff and we have also looked into the other file which related to the appointment of the plaintiff in service in the year 1940. We had to look into the file relating to the appointment of the plaintiff in the year 1940 in relation to another argument advanced on behalf of the defendant, with which we shall deal hereafter. After perusal of the file relating to the dismissal of the plaintiff in the year 1949, we are satisfied that it does not contain any material to show that the order of dismissal of the year 1949 was passed by the Premier himself or that the Premier had applied his mind to the question, and had felt satisfied in the matter. The file contains an office report. It was pointed out in that report, that although notice to show cause against the proposed punishment had been issued to the plaintiff, he did not file any reply to the same. It was said that the plaintiff did not show cause against the aforesaid notice, because according to the plaintiff, he had filed an appeal in this court from the decision in suit no. 1 of 1948, and that no cause could be shown until that appeal had been decided. The office report also said that notice of the appeal had not been received by the State till then. The time given to the plaintiff to show cause had expired, and as the plaintiff did not place any fresh material before the authorities, his case should be decided on the basis of the old enquiry and materials that were already before the State authorities, and that it was also said that on the basis of those materials, the Government should be asked to order that the plaintiff be dismissed from

service. It was also proposed that as the matter had once been sent to the Public Service Commission at an earlier stage, the matter be again sent to the Public Service Commission. The aforesaid report was placed before the Hon'ble Premier and the Hon'ble Premier wrote on that report 'agree'.

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It has been urged that the report and the note of the Premier established the fact, that the order of dismissal was passed by the Premier, or that the order has been passed after Premier had felt satisfied in the matter. On behalf of the plaintiff, reliance had been placed on r. 41 of the Rules of Executive Business and Secretariat Instruction and it has been urged that when a matter had been directed to be sent to the Public Service Commission, the State Government did not have the power to take decision about the merits of the case until the reaction of the Public Service Commission had been known. It is doubtful whether that rule would be applicable to the present case, but what is apparent is that, when it had been proposed that the matter be sent to the Public Service Commission, and the matter had still to be sent there, it could not be open to the State Government to take any final decision in the matter, without awaiting the advice of the Public Service Commission. In fact we are of the view that the word "agree" used by the Premier does not imply that he agreed to the dismissal of the plaintiff. Read in the context of the report, the only conclusion that can be arrived at is that the Hon'ble Premier had agreed only to the proposal that the case of the plaintiff be decided on the basis of the old materials and that the matter be referred to the Public Service Commission. We are, therefore, of the view that even these documents which were contained in the Government file, do not go to establish that the order of dismissal was passed by the Premier or that it was issued after the Premier had applied his

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mind to the facts of the case and after he had felt satisfied about the same.

The other contention made on behalf of the plaintiff-appellant is that inasmuch as the plaintiff was appointed in 1940 by the Governor of the State, he could not be dismissed from service by an order of the Premier, or that of the Chief Secretary. The power to dismiss could not be delegated to a subordinate authority. Such a delegation would be in contravention of s. 240(2) of the Government of India Act. It was further argued that so far as the plaintiff is concerned, he was actually appointed by the Governor in the year 1940, he could not be dismissed either by the Premier or the Chief Secretary even if, the portfolio of Appointment Department may have been assigned to the Premier thereafter. On the basis of such delegation, the Premier could exercise the power of dismissal in the case of those persons only, who had actually been appointed by him. He could not exercise the power of dismissal in notice of a person who had in fact been appointed by the Governor.

S. 240 of the Government of India Act, 1935, in the first place provides that no person, who is a member of a civil service of the Crown in India, or holds any civil post under the Crown of India, shall be dismissed from service of His Majesty by any authority subordinate to that by which he was appointed. If the actual appointment had been made by the Governor in this case in the year 1940 then in spite of subsequent delegation of the power of appointment and dismissal, the power to dismiss the plaintiff rested with the Governor. The object of s. 240(2) of the Government of India Act, in other words, cannot be allowed to be defeated by having recourse to delegation of powers. S. 240 is certainly not contravened in cases where on the strength

of delegation of powers any subordinate authority makes an appointment and then the same authority subsequently orders the dismissal of the appointee. But in a case where actual appointment had been made by one authority and the subsequent order of dismissal is passed by an authority subordinate to that authority, the provision of s. 240(2) is certainly contravened. In this view of the matter, it is clear that the power to dismiss an employee who had been appointed by the Governor, could not be exercised by an authority subordinate to him. We do not suggest that the delegation of authority to appoint and consequently to dismiss, is illegal, but the delegation to a subordinate authority of power to dismiss an employee who had been appointed by a higher authority is certainly repugnant to s. 240(2), and, is therefore, unconstitutional. The present one is an instance of a case, where the actual appointment had been made by the Governor, and order of dismissal was made by the Chief Secretary or by the Premier as alleged by the defendant. It was then suggested, though faintly, that it had not been shown by the plaintiff that he was appointed by the Governor in the year 1940. It is, however, not possible for us to accept that submission. It is not in controversy that in the year 1940, it was the Governor who held the power to make such an appointment under the Government of India Act, 1935. We have already mentioned that we have also looked into the file in the possession of the defendant relating to the appointment of the plaintiff in the Provincial Civil Service in the year 1940. The office prepared a report, dated 5th June, 1939 showing the names of various candidates, who had been declared successful in the Provincial Civil Service Examination on May 5, 1939. The plaintiff is one of them. Comments were made in that report about the various candidates, and in the end, five persons were named who could be appointed to the Pro-

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vincial Civil Service as non-Muslims. Plaintiff is one of them. From the said report, we find that it was requested that the Deputy Secretary may obtain Government orders, and that it was directed that his Excellency should also see. The report was seen by the Premier, who put his signature on the same on 7th June, 1939 in token of his consent. The matter was then placed before the Governor and the Governor finally put his signature on it on the 10th June, 1939. The respondent was very well aware of the fact that it was the Governor, who was the appointing authority and that it was he, who had to apply his mind to the question of dismissal of the plaintiff. That this is so, is clear from the notice issued by Sri B. N. Jha, Chief Secretary to Government of United Provinces on 11th April, 1949, to the plaintiff. The aforesaid notice is in the following terms :

“Whereas, you Shri Om Prakash Gupta, were subjected to a departmental enquiry in 1944 in respect of your conduct as a Deputy Collector in Kheri, and whereas the Governor is satisfied that on the basis of the evidence recorded during the course of the said inquiry the finding of the Commission, namely, that the charges were established against you, is correct, it is proposed to dismiss you as your conduct has been found to be unbecoming of an officer of the United Provinces Civil (Executive) Service. Before, however, arriving at a final conclusion and passing an order of dismissal, you are hereby required in accordance with the provision in sub-s. (3) of s. 240 of the Government of India Act, 1935, as adopted by the Indian (Provisional Constitution) Order, 1947, to show cause within a period of one month from the date of the

receipt of this notice why you should not be dismissed from service.

(Sd.) B. N. JHA,

Chief Secretary to Government, U. P."

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It was claimed in the above notice that it was the Governor who was satisfied in the matter. We are, therefore, of the view that there can be no manner of doubt that the appointment of the plaintiff in 1940 was made by the Governor. There is no evidence on behalf of the defendant to show that somebody else and not the Governor had appointed the plaintiff. This being so, even if it were to be assumed for a moment, that the Premier had applied his mind to the question of dismissal of the plaintiff, the order of dismissal would still be invalid.

There is absolutely no material on the record to prove that the order of dismissal of the plaintiff was passed by the Governor and that this is so, has not been disputed by the learned Standing Counsel.

All that had been contended on behalf of the State is that the power to appoint and consequently to dismiss employee of the cadre of the plaintiff, has been given to the Premier under the Rules of Executive Business and Secretariat Instructions framed under s. 59 of the Government of India Act, 1935, which continued to be in force with certain modifications by virtue of s. 8 of the Indian Independence Act, 1947. The Rules of Executive Business and Secretariat Instructions came into force from August 15, 1947, and it was contended that in the year 1949 when the order of plaintiff's dismissal was made, the power to appoint and dismiss vest-

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ed in the Premier and not the Governor. Reference was made to r. 4 which reads as follows:

“The Premier shall allot amongst the Ministers the business of the Government by assigning one or more Secretariat Departments to the charge of a Minister. The existing allotment is shown in the schedule of these Rules.”

The substituted schedule referred to above consists of two columns. First column is headed ‘*Portfolio*’ and the second “Departments”. First item in the schedule deals with *port folio* entrusted to the Premier. One of the departments mentioned therein is “appointment”. It has been urged that as those Rules and Secretariat Instructions have been framed under s. 59 of the Government of India Act, 1935, by the Governor, the power of appointment and dismissal, passed on to the Premier, and the Premier was competent to dismiss the plaintiff.

Part II of the back of Rules relied upon by the learned counsel for the State contains, what are described as “Secretariat Instructions”. The said instructions are purported to have been issued under R. 14 of the Rules of the Executive Business. The preamble given to Part II of the book of Rules reads as follows:

“In pursuance of the provisions of R. 14 of the Rules of Executive Business, the Premier of the United Provinces has been pleased to make, as a supplement to the aforesaid Rules, the following instructions for the more convenient transaction of the business of the Provincial Government in the Council of Ministers and in the Department of the Secretariat.”

Cl. (18) of the said instructions gives a list of cases, which must be submitted to the Premier by the Secretary of the

Department concerned after consideration by the Minister incharge but before the issue of orders. Sub-cl. (iii) of cl. (1) of para. 18 of the instructions refers to the cases dealing with the first appointment or dismissal of any officer of a Provincial service. According to the above instructions, even if the portfolio of appointment had been given to some Minister other than the Premier, the cases of first appointment or dismissal of any officer of Provincial service are required to be submitted to the Premier by the Secretary of the Department concerned before the issue of orders. As the department of appointment was allotted to the Premier himself, the question of reference of the case of the dismissal of the plaintiff by the Secretary of the Department to the Premier after consideration by the Minister incharge, could not arise. It may, however, be noticed that the Rules under which the Secretariat instructions have been given, themselves have been framed under s. 59 of the Government of India Act, 1935 and not under s. 241 of the Government of India Act, 1935.

It had been contended on behalf of the plaintiff that it is not the aforesaid Rules and instructions, which had to be looked into, in connection with the question of appointment and dismissal, but the rules which are relevant are those, which were framed under sub-ss. 1(b) and 2(b) of s. 241 of the Government of India Act, 1935. These Rules have been described as the U. P. Civil service (Executive Branch) Rules, 1941. The book of the said Rules which purports to have been corrected up to September, 1953, has been placed by the plaintiff before us for our consideration. The plaintiff has urged that the subject of appointment, dismissal and the conditions of services are specifically dealt with by s. 241 of the Government of India Act, 1935, and not by s. 59 of that Act. The preamble of the aforesaid United Provinces

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Civil Service (Executive Branch) Rules, 1941 is quoted below:

"In pursuance of the provision of sub-ss. 1(b) and 2(b) of s. 241 of the Government of India Act, 1935 and in supersession of all existing rules and orders on the subject, the Governor of the United Provinces makes the following rules, regulating recruitment to posts in, and the condition of service of persons appointed to, the United Provinces Civil Service (Executive Branch)."

Reliance has been placed by the plaintiff on rr. 20 to 24 of the said United Provinces Civil Service (Executive Branch) Rules. R. 20 enjoins that the Governor shall make appointment to the service on the occurrence of substantive vacancies by taking candidates alternatively, so far as this may be possible, from the two lists prepared under r. 18. Candidates shall be taken, in the order, in which, they stand in the list and the first candidate taken shall be from the list of Tahsildars. Cl. (2) of r. 20 points out that the Governor may make appointment in temporary or officiating vacancies. R. 21 deals with the question of seniority; r. 22 with the question of period of probation; r. 23 with the question of extension of the period of probation; and r. 24 with the question of confirmation. The plaintiff urges that a perusal of these Rules makes it clear that the power to appoint continued to be with the Governor in the year 1949 when the plaintiff was dismissed. It is, however, not necessary for us, in this case, to enter into that question. It may be that in the year 1949, the *portfolio* of appointment came to be held by the Premier. The short question which arose in the present case was whether by holding the aforesaid *portfolio* in 1949, the Premier could have the power to dismiss the plaintiff, who as we find, had been actually appointed by the Governor in the year 1940.

We have already arrived at the conclusion that this could not be done. Such an effect of the Rule framed under s. 59 of the Government of India Act, 1935, would be violative of s. 240(2) of the said Act. For the same reason, a further argument of the learned counsel for the respondent has to be rejected. This further argument is based on Art. 154 of the Constitution. It has been urged that the powers which are exercisable by the Governor could be exercised by him, either directly or indirectly through others. But even Art. 154 of the Constitution makes it abundantly clear that functions to be performed by the Governor could be got performed through others provided in so doing, none of the provisions of the Constitution is violated. In our opinion, the transfer of power of dismissal in respect of a person appointed by the Governor would clearly be in contravention of s. 240(2) of the Government of India Act, 1935, or Art. 311 of the Constitution.

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On the question of delegation of power, reliance has been placed on decisions of various courts. The view taken in the case of *Mahadev Pd. Roy v. S. N. Chatterjee* (1) supports the plaintiff's contention. In that case, the petitioner Mahadev Prasad sought a writ in the nature of *certiorari* to quash the order of respondent no. 1, Mr. S. N. Chatterjee, Deputy Superintendent of the Bihar Government Press, dated 16th September, 1953 dismissing the petitioner from service. On 16th July, 1928, the petitioner was appointed as Lino-operator in the Government Printing Press, Gulzaribagh by the Superintendent of the Government Printing Press. Service of the plaintiff was confirmed and he was promoted to be a Lino Foreman in 1942. In 1951, the Deputy Superintendent started proceedings against the petitioner on the allegation that the petitioner had committed theft of lino-

(1) A.I.R. 1954 Pat. 285.

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metal. There was a criminal prosecution of the petitioner, but by the order of the Magistrate dated 26th March, 1952, he was acquitted. The petitioner thereafter made prayer to the Deputy Superintendent for reinstatement. In July, 1952, the Deputy Superintendent initiated a second proceeding against the petitioner based on the same facts. After considering the petitioner's explanation, the Deputy Superintendent agreed that the petitioner had been acquitted of the charge of theft, but he proceeded to pass an order dismissing him from service. The petitioner took objection to the effect that he having been actually appointed by the Superintendent of the Government Printing Press, could not be dismissed by the order of the Deputy Superintendent of the Government Press. Reliance was placed on Art. 311, cl. (1) of the Constitution. The view taken by that court was that the petitioner could be dismissed only by the Superintendent, Government Press or any higher authority and that the order of dismissal passed by the Deputy Superintendent was invalid and inoperative. It was also held that the Government order delegating the power of appointment and dismissal to the Deputy Superintendent which was made on 20th June, 1952, could be valid with respect to persons appointed by the Deputy Superintendent himself after that date. But that order could not be valid so far as the petitioner was concerned. The reason for saying so was that the actual appointment of the petitioner was made by the Superintendent, and that consequently, the petitioner was protected under Art. 311 of the Constitution. It was observed that the said order of delegation, dated 20th June, 1952, was repugnant to Art. 311 so far as the petitioner's case was concerned and to that extent that Government order was invalid.

Next reliance was placed on the case of *Mohammad Matteen Qidwai v. Governor General-in-Council* (1).

(1) A.I.R. 1953 All. 17.

In that case, it was held that the petitioner having been appointed by the General Manager, his services could not be terminated by an officer lower than the General Manager, though they could be terminated by one superior to the General Manager. It was also held that the power of dismissal could not be delegated and any rule to the contrary was void, in view of provisions of s. 240(2) of the Government of India Act, 1935.

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The above view of law finds further support from the case of *Balakdass Vithoba v. Asstt. Security Officer, S. E. Railway, Bilaspur* (1). The view taken in that case was that the power under Art. 309 of the Constitution to frame rules, could not be exercised so as to contravene Art. 311(1) of the Constitution. The power of the Assistant Security Officer could not, therefore, extend to dismiss employees who were appointed actually by a higher authority. It was further held that the test, whether Art. 311(1) is contravened, is not, that the authority should be performing the same functions, but that it should not be lower in rank than the authority that appointed a civil servant. In the case of *Abid Mohamad Khan v. The State of Madhya Bharat* (2), it was observed with regard to Art. 311(1) that the language of that clause does not indicate that the power to determine the services of the civil servant was intended to be conferred on the person who was an appointing authority on the date the order of dismissal of the public servant was passed. The Article talks of factual appointment and states in express terms that no person shall be dismissed by an authority subordinate to that by which he was appointed. It was further held that the proposition is undisputable that if a civil servant is dismissed from service by an authority, which is inferior in rank to that

(1) A.I.R. 1960 M.P. 183.

(2) A.I.R. 1956 M.B. 259.

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by which he was in fact appointed, the dismissal is invalid and in operative.

The Punjab High Court also took the same view in the case of *Gurmukh Singh v. Union of India, New Delhi* (1). So also did the Madras High Court in *Pioneer Motors Ltd. v. O. M. A. Majeed* (2).

An attempt to overcome the above difficulty has been made on behalf of the respondent by advancing yet another argument. The mental process which compelled such an argument was, that, if it could be shown, that the appointment of the plaintiff was made by the Premier himself, the order of dismissal alleged to have been made by the Premier in the year 1949, would become perfectly valid. It may be mentioned that in view of our finding that it has not been established in this case that the order of dismissal of the plaintiff in the year 1949, is attributable to the Premier, it would not be necessary for us to notice the argument that has now been advanced by the learned counsel for the respondent. Nevertheless, we consider it appropriate to briefly deal with the same.

It has been urged that as a result of the Indian Independence Act, 1947, plaintiff's service came to an automatic end from 15th August, 1947. Thereafter, if he remained in service, it would be the result of a fresh appointment in the year 1947. Such appointment, it is urged must be deemed to have been made by the Premier to whom the portfolio of appointment had been transferred. Incidentally, it was also urged that in spite of declaration by the court that the order of dismissal of the plaintiff made in the year 1944 was illegal and inoperative, the plaintiff could not be deemed to have continued in service in the year 1947. We do not find any substance in the last submission. The result of the decision in Suit No. 1 of 1948 was that the order of dismissal of

(1) A.I.R. 1963 Pun. 370.

(2) A.I.R. 1957 Mad. 48.

the plaintiff of the year 1944 was for all purposes effaced and it could not, therefore, be of any consequence.

On the question of automatic termination of plaintiff's service on 15th August, 1947, reliance has been placed on the case of *State of Madras v. K. M. Rajagopalan* (1). In our view, that decision of the Supreme Court has no bearing on the present case. Sri K. M. Rajagopalan was recruited to the Indian Civil Service by open competitive examination in 1936 and he joined duty in the then Province of Madras in October, 1937. The last office that he held was as Sub-Collector and Joint Magistrate at Dindigal. While on leave, he received a letter from the Government of India dated 19th June, 1947, wherein he was asked whether he was willing to continue in the service of the Government after the then contemplated transfer of power from the British Government to the Dominion of India on 15th August, 1947. He expressed his willingness to do so. On 9th August, 1947 he received a communication from the Government of Madras dated 7th August, 1947, which was signed by the Chief Secretary thereof stating that it had been decided not to retain him in service from and after 15th August, 1947, and that his service would, therefore, be terminated as on the afternoon of 14th August, 1947. Sri Rajgopalan thereafter proceeded to file suit which gave rise to the appeal that was decided by the Supreme Court. It was alleged on behalf of Sri Rajagopalan that the termination of his services by the order dated 7th August, 1947, was in violation of the statutory guarantee relating to his service under s. 240 of the Government of India Act, 1935. One of the pleas raised in defence against his claim was that on the transfer of power to the newly constituted Dominion of India in pursuance of the Indian Independence Act, as and from

(1) A.I.R. 1955 S.C. 817.

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the appointed day i.e. 15th August, 1947, the tenure of the service of the plaintiff came to an end and he had no legal claim to continue in service thereafter. It was also alleged that the career of the plaintiff under covenant with the Secretary of State came to a legal termination as and from 15th August, 1947.

On that a basis, the plea raised in defence was that it was not correct on the part of the plaintiff to state that there was any termination by the Government of Madras and that there was utter lack of legality in the order passed by the said Government. The contention made by the Attorney General was to the effect that the political changes which came into force from 15th August, 1947 operated in law to terminate the services of all persons in the position of the plaintiff as and from 15th August, 1947, and that it was open to the new Dominion Government or the Governments of the various provinces either to invite such persons to continue to be in their respective service, or to intimate that they were no longer required, and that it was in the exercise of this option that the Government of Madras communicated to the plaintiff an advance intimation on 7th August, 1947 that he would not be retained in service as and from 15th August, 1947. The contention with regard to the automatic termination of service in that case was based on three grounds:

(i) The political change which came into operation on 15th August, 1947, resulted in creating a new Sovereign State of India and on the creation of such Sovereign State, the pre-existing contracts of service under the previous Government automatically terminated;

(ii) The contract between the Secretary of State for India and the plaintiff being one of service terminated on the Secretary of State's ceasing to have control in respect of the services contemplated under the contract;

(iii) The statutory changes which came into operation as from 15th August, 1947, by themselves brought about a termination of such services and the protection of s. 240, Government of India Act, 1935, was no longer available to a person in the situation of the respondent.

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Their Lordships of the Supreme Court then proceeded to notice the various events that led up to political changes and the statutory provision by which they were brought about, in so far as they related to the class of service with which their Lordships were dealing in that case. It was observed that the question as to whether the Indian Independence Act brought about a full Sovereign State for each and every purpose, was a question of considerable importance and was not free from difficulty. Their Lordships of the Supreme Court did not decide that question, inasmuch as the case before their Lordships of the Supreme Court could be decided with reference to the question as to what exactly had been brought about by the Indian Independence Act and the subsidiary legislation, which followed therefrom in so far as they related to the tenure of persons in the position of the plaintiff. Their Lordships then clarified the idea as to the tenure of service with which their Lordships were dealing. Such appointments were made by the Secretary of State for India by virtue of the power conferred upon him under s. 244(1) of the Government of India, Act, 1935. The persons so recruited were appointed to the service called the Indian Civil Service. Each person so recruited had to enter into a covenant by means of an indenture between himself and the Secretary of State. Apart from the covenant, the tenure of such a service was regulated by a number of statutory provisions under the Government of India Act and one of the sections of that Act applicable to such services also, is s. 240. Their Lordships then observed that the tenure of an Indian

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Civil Servant was basically contractual but with conditions and prospects of such service regulated by statute. A person recruited to such service was in a very special position in comparison with persons holding other civil posts of the Government of India or the Provincial Government. The Indian Civil Service was a specially privileged class of service under the Crown with the essential characteristic of direct and ultimate protection by the Secretary of State representing His Majesty's Government. In connection with the basic changes brought about in view of the above by the Indian Independence Act, it was noticed, that the Secretary of State who, as a Member of British Cabinet, acting in the name of the Crown and responsible to the British Parliament, was exercising such control as was vested in him in respect of the affairs of India, and in particular as regards these services, completely disappeared. Reference to s. 7(1)(a), Indian Independence Act, 1947 was made and it was observed that as a consequence of the setting up of the new Dominions as from the appointed day, 15th August, 1947, His Majesty's Government in the United Kingdom ceased to have responsibility as respects the government of any of the territories which, immediately before that day, were included in British India. S. 10 of the aforesaid Act dealt with the subject of the Secretary of State's Services etc. in the following terms:

"The provisions of this Act, keeping in force provisions of the Government of India Act, 1935, shall not continue in force the provisions of that Act relating to appointments to the civil services of, and civil posts under, the Crown in India by the Secretary of State, or the provisions of that Act relating to the reservation of posts."

It is to be noticed that effect of the provisions of the Indian Independence Act referred to above was given

by the India (Provisional Constitution) Order of 1947 issued by the Governor General on 14th August, 1947, under the power of adaptation vested in him under s. 9(1)(c), Indian Independence Act. The various sections relating to the Secretary of State and his services were deleted. By the same order, changes were made under ss. 240 and 247 relating to certain conditions of service. The purpose of so doing was to withdraw the responsibility of the Secretary of State as regards the matters covered by these sections. As a result of it, the essential structure of the Secretary of State's services was altered and the basic foundation of the contractual-cum-statutory tenure of the service disappeared. It would thus appear that the decision of the Supreme Court in the aforesaid case can have no application to the present case, where the service in question is not a covenanted service. Even in the case which was considered by the Supreme Court, it was made clear that all persons who were previously holding civil posts were deemed to have been appointed and hence to continue in service except those whose case is governed by general or special orders or arrangement affecting his case. Such persons also continued to have the protection of s. 240(2) of the Government of India Act as modified. S. 240(2) of the Government of India Act as modified is as follows:

"No such persons as aforesaid, who having been appointed by the Secretary of State or the Secretary of State in Council 'continues' after the establishment of the Dominion to serve under the Crown in India shall be dismissed from the service of His Majesty by any authority subordinate to the Governor-General or the Governor according as that person is serving in connection with the affairs of the Dominion or of a Province, and no other such person as aforesaid shall be dismissed from the service

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of His Majesty by any authority subordinate to that by which he was appointed."

Persons, therefore, who have to be deemed to have been appointed and hence to continue in service except those whose cases were governed by general or special orders or arrangement affecting those cases are, therefore, clearly protected by s. 240(2) as modified.

Under the circumstances, we come to the conclusion that the order of dismissal of the plaintiff dated 1st September, 1949, is void, illegal and inoperative.

In view of our above finding, the plaintiff would be entitled to succeed, without any further findings on other issues involved in the case. The plaintiff, however, has urged that in the earlier suit, namely, suit no. 1 of 1948, no finding with regard to the question of validity of the enquiry made in the case of the plaintiff, was returned, and the result was, that on the basis of the aforesaid invalid enquiry, order of plaintiff's dismissal was passed for a second time. This gives the plaintiff the apprehension, that unless a finding is given now on the question of the validity of the aforesaid enquiry, the process may be repeated by the respondent. On such submission, the plaintiff has insisted that we should also give our findings on the other questions involved in this case.

The validity of the enquiry made by the Deputy Commissioner and the Commissioner, in the case of the plaintiff, has been questioned on a large number of grounds by the plaintiff. Plaintiff's contention is that he was denied reasonable opportunity to defend himself during the course of the enquiry; witnesses were examined by the Deputy Commissioner behind the back of the plaintiff; copies of depositions of the witnesses were not furnished to plaintiff to enable him to effectively cross-examine the said witnesses; evidence that the plaintiff wanted to produce was shut out inasmuch as witnesses

required to be summoned were not summoned at all; assistance of counsel was not permitted; witnesses were not allowed to be cross-examined; materials which were sought to be used against the plaintiff were not brought to the notice of the plaintiff; appointment of the enquiring officer was not made by the punishing authority; charges were not framed by the punishing authority; suspension order was not passed by the punishing authority, nor was the second show-cause notice issued by it. It was also contended that the English translation of the statements of witnesses, which were furnished to the plaintiff, were incorrect.

We propose to deal with some of the grounds which have been relied upon by the plaintiff with a view to decide the question whether the enquiry was vitiated under any provision of r. 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930, or on account of its being violative of any principles of natural justice.

Four charges of misbehaviour were framed against the plaintiff. They are as follows:

"1. That on or about August 15, 1944 one Mst. Jamila was presented before you in court by the Police under a warrant under s. 100, Criminal Procedure Code. You did not decide the case on the 15th August but postponed it to the 19th August, 1944 making over the girl to the custody of one Hafiz Habib Beg. On 17th of August you sent for Mst. Jamila from the house of Hafiz Habib Beg at about 7 p.m. through your orderly Jangu Khan and detained the girl at your house for the whole night evidently to use her for immoral purposes. Next morning the girl expressed a desire to go with her father who came to receive her at your house but you did not allow her to do so and again sent back the girl to the house of Hafiz Habib Beg.

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2. That on or about August 10, 1944 the police, on the complaint of one Puttu Lal, produced before you one Mst. Gunga Kurmin for whose arrest you had issued a warrant under s. 100, Criminal Procedure Code. You directed Mst. Gunga and Puttu Lal to be escorted to your house by your orderly Jungu Khan. You sent away Puttu Lal and detained Mst. Gunga alone at your house for about two hours evidently to use her for immoral purposes.

3. That sometime in the last week of July, 1944, a girl named Taqderan was produced before you under a warrant of arrest issued by you under s. 100, Criminal Procedure Code but you asked the parties to present the girl after court hours at your house. When the girl was brought to your house you asked the people accompanying her to stay outside, and took the girl alone inside your house under pretext of recording her statement and detained her there for two hours evidently to use her for immoral purposes.

4. That in all these three cases you conducted yourself in a manner unbecoming of an officer of the U. P. C. S. and therefore you are asked to show cause why you should not be dismissed from service."

Mr. T. B. Bishop, I.C.S., Commissioner, Lucknow Division gave findings on the charges framed against the plaintiff. With regard to charge no. 1 he came to the conclusion that it had been abundantly established; on charge no. 2, he said that it was substantially established; and he further found that charge no. 3 had also been established. These findings are dated 30th September, 1944. It is conspicuous to note that no finding was given, either way, on charge no. 4. On the same date, Mr. Bishop also sent a D. O. to the Chief Secretary to the

Government of United Provinces described as "confidential". The said confidential letter consists five paragraphs. We need not encumber the judgment by quoting the D. O. in full, but it is necessary to mention a portion of para. 5 thereof, which runs as follows:

"A critical discussion of the evidence regarding each of the first three charges individually has been appended to the record. You will see that I find no reason to differ from the conclusions already conveyed to you in my confidential D. O. no. 730, dated 1st September, 1944, on any of the first three charges. The same applies to charge no. 4. Though I had not stated this previously in so many words, it will be clear that in my opinion Mr. Gupta had failed to show cause why he should not be dismissed from service. In my opinion the evidence warrants the conclusion that Mr. Gupta was guilty of immoral conduct towards the girls in the commonly accepted sense. But even if it were taken that no inference could be drawn regarding Mr. Gupta's conduct towards the girls when left alone with them in privacy, it seems to me that his action in using his authority as a magistrate to have brought to his house on false pretexts girls who had come before him in his official capacity in court, and in keeping them alone with him for considerable intervals, itself amounts to conduct impossible to tolerate in a public servant, especially in view of the fact that there were no less than three instances within a month of Mr. Gupta's joining the district, and that he has been far from straightforward about them"

On the 23rd December, 1944, the plaintiff wrote to the Chief Secretary, Government of United Provinces, Lucknow requesting him that he may be furnished with copies of the detailed findings of the Commissioner,

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Lucknow Division, the Chief Secretary's note, the Public Service Commission's findings, as well as the order of the Governor. In reply to the aforesaid letter, the Deputy Secretary to Government, United Provinces wrote back to the plaintiff that the Chief Secretary's notes and the findings of the Public Service Commission could not be supplied to him, that the Governor's order dismissing him from service had already been communicated to him through the Commissioner, Lucknow Division, and that the plaintiff could get a copy of the findings of the Commissioner, Lucknow Division, on payment of copying charges in advance. While in the witness-box, the plaintiff stated that the Government sent to him the findings of Mr. Bishop on charges nos. 1, 2 and 3, dated 30th September, 1944. It has not been shown by any evidence on behalf of the respondent that a copy of the D. O., to which reference has been made by us, was also given to the plaintiff. It is, therefore, clear that the finding of the Commissioner relating to the fourth charge was at no stage furnished to the plaintiff. The submission made on behalf of the plaintiff is that as a matter of fact, it was only the finding on the 4th charge, which ultimately led to the dismissal of the plaintiff as is clear from the confidential D. O. of the Commissioner and inasmuch as a copy of the same had not been given to the plaintiff, he had no opportunity to meet the 4th charge or to show that the findings of the Commissioner relating to the 4th charge is erroneous.

In the case of *Abul Hasan v. Works Manager, Northern Railway, Lucknow* (1), a Division Bench of this Court sitting at Lucknow took the view that the findings returned by the Tribunal clearly indicated the point or points which had weighed with it for proposing action against the party, and that, it would, therefore, only be

(1) A.I.R. 1961 All. 338.

proper for the party concerned to try to meet the adverse conclusions reached by the Tribunal against him, if he could successfully do so. It was also said that when copy of findings on the charges returned by the Enquiring Committee, was not given to the party, the cause of the party was seriously prejudiced. Consequently, it would result in denial to the party of reasonable opportunity to answer the charges and the provisions of Art. 311(2) of the Constitution would stand violated. We are not only bound by the aforesaid decision, but we are also in agreement with the view expressed therein.

To the same effect is the view expressed by the Supreme Court in the case of *Mafatlal Narandas Barot v. J. D. Rathod* (1).

In the case of *Union of India v. Piara Singh* (2), a learned Single Judge of this Court also took the view that it cannot be possible for a party affected to take advantage of the opportunity to show cause when the second notice relating to the proposed punishment is issued to him, if the copy of the finding of the Enquiring Officer is not given to him. The learned Single Judge also made reference to the decision of the Supreme Court in the case of *Union of India v. H. C. Goel* (3). Other courts have also taken similar view, but it is not necessary to deal with all those cases in this case. We are of the view that the omission to supply the plaintiff with a copy of the finding of the Commissioner, Lucknow Division, relating to the 4th charge, is fatal to the order of plaintiff's dismissal.

We shall now deal with another substantial complaint of the plaintiff regarding want of reasonable opportunity to him during the course of the enquiry. It may be mentioned that the statements of witnesses, which

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(1) A.I.R. 1966 S.C. 1364.

(2) 1966 A.L.J. 835.

(3) A.I.R. 1964 S.C. 364.

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were used against the plaintiff, were recorded by the Deputy Commissioner. One Hafiz Habib Beg was likewise examined by the Deputy Commissioner on 19th August, 1944, in connection with the charge against the plaintiff relating to Musammat Jamila. The statement of the witnesses was recorded by the Deputy Commissioner behind the back of the plaintiff. The witnesses so examined, were allowed to be cross-examined by the plaintiff when the enquiry was taken up by him. On 22nd September, 1944, the witness Hafiz Habib Beg was recalled for examination. Before making statement, the witness stated that he had made his statement before the Deputy Commissioner on 19th August, 1944, but he wished to make the following statement regarding what he subsequently found out from Musammat Jamila. At that stage, the Commissioner made a note to the effect that the statement given below was volunteered and recorded at witnesses' own request. It is important to quote the additional statement that the witness made, which is as follows:

"On 20th, she (Jamila) told me that she had been afraid to tell the truth on account of her parents' *izzat* and *biradari panchayat*. She then told me in confidence. She told me that she remained outside at the house till 11 p.m. or so. Then she went inside and up on to the roof. The S. D. M. sent for her there. She said that the S. D. M. asked me whether I had menses. I said this was not a question to ask me. He said he wanted to know whether I was minor or not. He said he wished to see my pubic hair. I refused. Then the S. D. M. seized my hand and tied my hands, and made me completely naked. I began to cry out and I appealed to him (*Khushamad karne lagi*). He let go of me (*hat gaye*). Then she said that if my father-in-law's people re-

leased (*choor diya*) me, I should take service with him and feed his children."

The plaintiff attempted to cross-examine the witness with regard to the additional statement made by the witness but he was not allowed to do so. The plaintiff asked the Commissioner to allow him to cross-examine the witness on the voluntary statement thus made. The reply that the Commissioner gave to the plaintiff was:

"No. You have already cross-examined him. Too much time is being wasted. Let us proceed to the next witness."

There is no doubt that the Commissioner did make use of this voluntary statement made by the witness in giving his finding on charge no. 1 against the plaintiff. The Commissioner in that finding has mentioned as follows:

"I do not see that the *pesh imam* (Hafiz Habib Beg) could have had knowledge of what Mst. Jamila had told the Deputy Commissioner, or of what Mr. Gupta himself had stated in his examination before me on August 28, unless he had been told by Mst. Jamila or Mr. Gupta himself, which last is unlikely. The *pesh imam's* mention of these enquiries regarding hair and menses therefore appears to afford independent corroboration of the fact that Mr. Gupta in these ways made improper addresses to the girl. The *pesh imam's* further deposition in question should be read. It amounts to evidence of direct admission by Mst. Jamila that her modesty was outraged by Mr. Gupta. I do not see why it should be disregarded even though Mst. Jamila herself has denied it in cross-examination before me."

As a matter of fact, none of the facts disclosed by the witness in the volunteered part of his statement had been

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mentioned by the witness in the earlier part of his statement. It was the volunteered part of the statement which could, if accepted, damage the cause of the plaintiff, and the plaintiff, therefore, should have been permitted to cross-examine the witness with regard to that part of his statement. We, therefore, find force in the submission made on behalf of the plaintiff that this episode furnishes another instance of denial of reasonable opportunity to the plaintiff to defend himself.

On this part of the case, one of the other submissions made on behalf of the plaintiff may now be considered. It has been pointed out by the plaintiff that there is absolutely no evidence or material on the record to establish that the punishing authority had ever appointed the Deputy Commissioner, or the Commissioner to make enquiry against the plaintiff; there is no evidence to show that the charges were framed by the punishing authority or the order of suspension was passed by the punishing authority or that the second stage notice was issued or the final order of dismissal passed, by the punishing authority. It has also been contended that there is no evidence on the record to show that the aforesaid functions had been performed by any person, who may have been appointed to do so by the punishing authority. This being so, what has been urged on behalf of the plaintiff is that the entire proceedings leading upto the order of dismissal are unauthorised and illegal.

In the case of *Khem Chand v. Union of India* (1), relevant facts were that Khem Chand was a Sub-Inspector under the Delhi Audit Fund and the authority competent to appoint and dismiss him from service was the Deputy Commissioner of Delhi. Charges were framed against him and a preliminary departmental enquiry was

(1) A.I.R. 1958 S.C. 300.

held by one Mahipal Singh under the orders of the Deputy Commissioner. The enquiry was completed by one Mr. J. B. Tandon under the orders of the Deputy Commissioner. Mr. Tandon held that some of the charges were proved against Khem Chand and recommended his dismissal from service. The Deputy Commissioner approved his recommendation and then Khem Chand was dismissed. The following observations were made by the Supreme Court:

"When the Deputy Commissioner accepted the report and confirmed the opinion that the punishment of dismissal should be inflicted on the appellant, it was on that stage being reached that the appellant was entitled to have a further opportunity given to him, to show cause why that punishment should not be inflicted on him. There is, therefore, no getting away from the fact that Art. 311(2) has not been fully complied with and the appellant has not had the benefit of all the constitutional protection, and accordingly his dismissal cannot be supported."

In the case of *Krishn Gopal v. State* (1), the court took the view to the effect that it was for the punishing authority to be satisfied that the charges were proved before the second show-cause notice was issued. The dismissing authority itself must be satisfied first that the charges against the delinquent public servant were proved and then he must tentatively decide about the punishment to be inflicted on him and it is only when the latter stage is reached that the notice under cl. (2) of Art. 311 should issue under his authority to the delinquent servant to show cause against that punishment.

(1) A.I.R. 1960 Orissa 37.

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In the case of *Shardul Singh v. State of Madhya Pradesh* (1), while dealing with the question, the court observed as follows:

"Now, the exercise of disciplinary powers, or the field of disciplinary action, is not confined merely to the passing by the appointing authority of an ultimate order imposing disciplinary punishment against the employee. It extends even to the very initiation of disciplinary action against a civil servant or employee by framing charges against him and holding, or directing the holding of, an enquiry into those charges. The framing of charges, the holding of an enquiry into them, the suspension of the civil servant during the enquiry, the notice to show cause, are all steps in the exercise of the disciplinary powers. These steps must be taken by the disciplinary authority and not by a delegate of that authority."

On the materials on the record, it is not possible for us to hold that it has been established in this case that the enquiring officer was appointed by the punishing authority or appointed under the authority of the punishing authority, that the charges were framed by the competent authority or under the authority of the competent authority; that the suspension order was passed and that second show-cause notice issued by the competent authority or under the authority of the competent authority. It may also be mentioned in this connection that the plaintiff had filed yet another suit in the court of the Civil Judge, Allahabad, which was Suit no. 65 of 1951 against the State of Uttar Pradesh with a view to obtain a declaration that plaintiff's suspension from the Government service was not proper and valid and also for recovery of a certain amount as arrears of pay. It may be recalled that the plaintiff was suspended on 23rd August,

(1) A.I.R. 1966 M.P. 198.

1944 by an order of the United Provinces Government suspending him forthwith pending enquiry into his conduct. Plaintiff's suit was contested but it was decreed and declared that the suspension order dated 23rd August, 1944 was illegal, void and inoperative. Plaintiff's claim for arrears of salary was also decreed to a certain extent. One of the grounds for questioning the validity of the above suspension order was that the order was not expressed in the name of the Governor as required by s. 59 of the Government of India Act, but that it was given by the Chief Secretary, United Provinces in his own name and, therefore, was not a proper order. The court deciding the case took the view that the aforesaid order was not legal and valid also on the ground noticed above. This became final between the parties.

Apart from it, it was held by the Supreme Court finally in the appeal filed by the plaintiff to that court that that order of suspension lapsed with the order of dismissal passed in the year 1944. We, however, do not find any order of suspension passed a second time after the order of dismissal of 1944 had been declared invalid by the court. On April 12, 1949, Sri K. P. Bhargava, I.C.S., Joint Secretary to Government of United Provinces wrote to the Commissioner, Lucknow Division, on the subject of disciplinary action against the plaintiff. He referred to the fact that the civil suit of the plaintiff had been decreed and it had been declared that the order of dismissal of the plaintiff was void and inoperative. The letter proceeded to say that accordingly the order of dismissal was being set aside. The next sentence that occurs in the letter may be usefully quoted at this stage, which is as follows:

"Shri Om Prakash Gupta will, however, continue to be under suspension with effect from the forenoon of August 24, 1944, the date from which he was originally suspended, and will be entitled to the resumption of the same subsistence allowance of which he was in receipt before his dismissal . . ."

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The letter clearly indicates that the plaintiff was treated as continuing under suspension. It is, therefore, clear that the only order of suspension was the one which was passed in the year 1944, which, however, had been declared to be void and inoperative by the civil court and which finally was held by the Supreme Court to have lapsed with the order of dismissal of the year 1944. There was no subsequent order of suspension passed, much less, such an order by the competent authority. We are, therefore, of the view that the enquiry is also vitiated on account of the fact that the various steps leading up to the dismissal of the plaintiff on 30th August, 1949 have not been shown to have been taken by the competent authority or under the authority of the competent authority.

In the view that we take, it is not necessary for us to discuss other minor submissions made on behalf of the plaintiff with a view to establish that the enquiry made against him was invalid or that reasonable opportunity had been denied to him during the course of that enquiry.

It was then urged on behalf of the respondent that inasmuch as full opportunity to show cause at the second stage was given to the plaintiff, but he did not avail of that opportunity and did not show any cause, he cannot be permitted to question the validity of the first enquiry. Reliance has been placed on the case of *P. Joseph John v. State of Travancore-Cochin* (1). It was observed "In our opinion, in the present case, the petitioner had reasonable opportunity at both stages to enter upon his defence. He fully availed himself of the first opportunity and though a reasonable opportunity was also given to him at the second stage, he failed to avail himself of it and it is not open to him

(1) A.I.R. 1955 S. C. 160.

now to say that the requirements of cl. (2) of Art. 311 have not been satisfied."

So far as the facts of the case before the Supreme Court are concerned, it was not denied that the petitioner was given by the enquiring Commissioner all facilities for entering upon his defence. Before filing his written statement before the enquiring Commissioner, the petitioner and his counsel were afforded facilities to inspect the various files concerning the charges which he had to meet after inspecting those files, he had filed a full written statement explaining those charges. He was defended in the enquiry by a leading lawyer and was afforded fullest opportunity to examine and cross-examine the witnesses examined by the Commissioner. After the enquiry was concluded, the petitioner was furnished with a copy of the report of the Commissioner and was asked to show cause against the action to be proposed to be taken against him. Repeatedly, time was granted to him to show cause. Their Lordships of the Supreme Court found that it was difficult to say that the time allowed to him was not reasonable in view of the fact that he had taken part in the enquiry before the Commissioner and all the evidence had taken in his presence, and he had full opportunity to defend himself. In that case all the materials on which the Commissioner had reported against him was given in the report of the Commissioner and that was supplied to him with the show-cause notice. In these circumstances, their Lordships held that he could not be heard to say that he was not given reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The facts of that case are markedly distinguishable from the facts of the present case. When the finding of the Commissioner relating to the fourth charge was

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not given to the plaintiff at all, and it has not been shown by any evidence that the plaintiff had knowledge of the same, it is futile to say that the plaintiff failed to show cause against the same. We have also taken the view that the plaintiff was wrongly refused opportunity to cross-examine Hafiz Habib Beg on all material parts of his statement. Further we have found that the enquiry in the plaintiff's case is invalid on the ground that it has not been proved that the authority competent to take various steps leading up to the order of dismissal of the plaintiff, really took those steps. In view of the nature of infirmities in the enquiry and the order of dismissal, we are of the view that they go to the very root of the matter and cannot be deemed to have been waived by omitting to show cause against the notice with regard to the proposed punishment.

It was then urged on behalf of the respondent that the question whether the departmental enquiry made against the plaintiff was valid or not, cannot be reagitated in the present suit on account of the finding given by the court in Suit No. 1 of 1948. We have already mentioned the various issues that were framed in Suit No. 1 of 1948 and have referred to the fact that the counsel of the parties appearing in that case had made statement to the effect, that they did not want to adduce evidence on issues 1, 2 and 3 framed in that suit. They had also stated that it could be assumed that issues 4 to 8 of that suit dealing with the question of denial of reasonable opportunity to the plaintiff to show-cause against charges in the enquiry held by Mr. Bishop in 1949, would be decided in favour of the defendant. We have also made reference to the observation of the Civil Judge, who decided suit No. 1 of 1948 that he had heard issues Nos. 1 to 3 as preliminary issues at the desire of the parties

Learned counsel has urged that inasmuch as it was conceded on behalf of the plaintiff in that suit that issues 4 to 8 would be decided in favour of the defendant, the plaintiff cannot be allowed to resile from that concession and the decree passed on the basis of that concession creates the bar of *res judicata*, to the hearing of the same question again in the present suit. We are clearly of the opinion that no question of *res judicata* or estoppel by conduct or record arises in the present case. Issues Nos. 1, 2 and 3 of the earlier suit were decided as preliminary issues, and even if there had been no such statement on behalf of the parties as was made, other questions raised in defence, had to be assumed to be correct for deciding the preliminary issues. The statement clearly shows that it was only for the limited purpose of deciding issues 1, 2 and 3 that it was assumed that the decision on the other issues in the case would be in favour of the defendant. On the preliminary issues, it was the plaintiff who succeeded and not the defendant. It cannot be contended with any force that it was conceded by the plaintiff in that suit that the assumed findings on issues Nos. 4 and 8 would be treated as findings on merits of the questions involved on those issues for any other purposes than for decision on issues Nos. 1, 2 and 3 of the said suit. We, therefore find that it is open to the plaintiff to agitate the said questions in this suit and that the said controversy is not barred by any principles of *res judicata* or estoppel.

Our findings, therefore, in the present appeal are (1) that the order of dismissal of the plaintiff dated 30th August, 1949 has not been made by a competent authority, and therefore, is illegal, (2) that the departmental enquiry made under R. 55 of the Civil Service (Classification, Control and Appeal) Rules, 1930, is also invalid and illegal for the reason that the various steps that had been taken by the competent authority in the case, have not been shown to have been in fact taken

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by such competent authority or under the authority of such competent authority and on account of the fact that the findings of the enquiring authority on the 4th charge against the plaintiff were never furnished to him and further also on account of the fact that the plaintiff was denied opportunity to cross-examine Hafiz Habib Beg, a witness whose testimony was used against the plaintiff by the enquiring authority; (3) that the question whether the departmental enquiry is valid or not is not barred by any principles of *res judicata* or estoppel; (4) that the plaintiff's omission to show cause in response to the second notice issued to him in the year 1949 cannot result in the waiver of the objection that the order of dismissal dated 30th August, 1949 was not passed by the competent authority and the objection that the departmental enquiry had not been conducted by or under the authority of the competent authority. We, however, make it clear that we are not concerned with the question whether the charges brought against the plaintiff were true or not. That is essentially a matter to be decided by State Government. Had we not come to the conclusion that the enquiry and the order of plaintiff's dismissal have been made in contravention of s. 240 of the Government of India Act, 1935, we would have refused to interfere with the decision taken by the respondent. In view of our findings given above, the plaintiff is clearly entitled to appropriate reliefs.

The next question is what are the appropriate reliefs that can be granted to the plaintiff in the suit? The first relief that the plaintiff has sought is a declaration that the order of dismissal from service dated 30th August, 1949 against the plaintiff is illegal, wrongful, void and inoperative and that he continues to remain a full member of the Provincial Civil (Executive) ...

Service, United Provinces. The plaintiff is clearly entitled to that relief.

The second relief claimed is a declaration that no reasonable opportunity had been afforded to the plaintiff in the enquiry held by Mr. Bishop in 1944. Although we have arrived at a conclusion that the plaintiff has succeeded on that part of the case, but we are of the view that a separate declaration to that effect need not be granted. The first declaration involves the second declaration sought by the plaintiff.

The third relief sought by the plaintiff is a declaration that the plaintiff is a political sufferer. We agree with the view of the court below that such a relief could not be granted and we hold that it is not a question of any legal status.

The fourth relief sought is a declaration that the plaintiff is entitled to his full pay with all its increments, just as if he were discharging his duties honestly and efficiently. We are of the view that inasmuch as a decree for recovery of arrears of salary as claimed by the plaintiff is being granted, it is wholly unnecessary to grant a declaration to that effect.

The fifth relief is with regard to arrears of salary from 30th August, 1949 to 31st October, 1952 with interest amounting to Rs.24,592 and a decree for future salary from 1st November, 1952 onwards in the grade of Rs.640—30—700—50—850 with increments falling on each first of November. The plaintiff is undoubtedly entitled to a decree for arrears of salary but the question of the exact extent will be considered by us hereafter. In view of a decree for salary being granted to him, the plaintiff cannot be entitled to relief no. 6.

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With reference to relief no. 7, we hold that the plaintiff is also entitled to interest.

The eighth relief relates to the question of cost and relief no. 9 is the general prayer for any other or further relief.

R. Prasad, J. The next question is, at what rate are the arrears of salary to be calculated?

Both the parties have filed charts to indicate the amount of arrears of salary that the plaintiff would be entitled in the event of his success. These charts do not tally with each other. The difference in the two charts is due to the following causes:

(a) The chart prepared by the defendant does not take into consideration that the plaintiff had crossed efficiency bars twice, while the chart prepared by the plaintiff is based on the assumption that he had crossed the efficiency bars and is entitled to higher emoluments;

(b) According to the chart of the defendant, it was on 1st April each year that increments in the salary accrued to the plaintiff while according to the plaintiff's chart, it is the first of November each year that he became entitled to increment in his emolument.

As regards the question of efficiency bar, it may be noted that the Supreme Court while granting a decree for arrears of salary to the plaintiff in Suit No. 1 of 1948 assumed that the plaintiff had crossed first efficiency bar till then. We are, therefore, of the view that now that the time for crossing the second efficiency bar had elapsed, we must follow the precedent set forth by the Supreme Court and must assume for the purpose of calculating the salary that the plaintiff had crossed the second efficiency bar also.

On the question of the date of annual increment, we find that it used to be on 1st November as alleged by the plaintiff, and not on first of April each year as alleged by the defendant. We are also of the view that the plaintiff is entitled to interest at the rate of six per cent per annum. It may be noticed that the rate of interest payable to the plaintiff under r. 185 of the Financial Handbook and r. 776 of the Civil Service Regulations would be $7\frac{1}{2}$ per cent per annum. In view of the fact that the plaintiff has ultimately claimed interest at the rate of six per cent per annum only, we consider that it is reasonable to award interest at the rate of six per cent per annum.

This being so, we accept the figures shown in the chart filed by the plaintiff and decide to award a decree according to the same.

After the hearing of the case had almost concluded before us, the learned counsel for the respondent requested that notice of the appeal should be sent to the Advocate General of the State of Uttar Pradesh, inasmuch as according to him, the case involved a substantial question of law as to the interpretation of the Constitution. The learned counsel has referred to O. XXVIIA, r. 1 of the Code of Civil Procedure. The two salient questions involved in the case, as will appear from our judgment, are whether the order of dismissal of the plaintiff from Executive Service of the State has been passed by a competent authority and whether sufficient opportunity was given to the plaintiff to defend himself. In the case of *Krishna Swami v. Governor General-in-Council* (1), it was held by the Federal Court that where the only question involved in the appeal to the Federal Court was whether the appellant had been given a reasonable opportunity of

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showing cause against his dismissal from service with in s. 240(3), it could not be said that a substantial question of law as to the interpretation of s. 240(3) of the Government of India Act, was involved. So far as the first question is concerned, in our view, that also does not involve any substantial question of law as to the interpretation of the Constitution. The State is party to this appeal and the case on behalf of the State has been argued by the learned Standing Counsel. We, therefore, find ourselves unable to accede to the request made by the learned counsel for the respondent.

We, therefore, allow the appeal, set aside the judgment and decree of the court below and decree the plaintiff's suit for the following reliefs:

(1) It is declared that the order of the plaintiff's dismissal from service dated 30th August, 1949 is illegal, wrongful, void and inoperative and that the plaintiff continued to be a member of the Provincial Civil (Executive) Service Uttar Pradesh in spite of the said order of dismissal.

(2) We further grant a decree for Rs.24,003.29 only on account of arrears of salary with interest at the rate of six per cent from 30th August, 1949 to 31st October, 1952 as claimed by the plaintiff calculated on the basis of the chart submitted by the plaintiff,

(3) We also grant a decree to the plaintiff for recovery of *pendente lite* salary at the following rates:

(a) Rs.640 per month from November 1952 to 31st October, 1953,

(b) Rs.670 per month from November, 1953 up to 31st October, 1954,

(c) Rs.700 per month from November, 1954
up to 31st October, 1955,

(d) Rs.750 per month from November, 1955
to 31st October, 1956,

(e) Rs.800 per month from November, 1956
to October, 1957,

(f) Rs.850 per month from November, 1957
till the date of this decree.

The plaintiff shall also get interest on the
amount of his salary *pendente lite* at the rate
of six per cent per annum.

The plaintiff's right to recover *pendente lite*
salary and interest is subject to payment of court fee
by him.

(4) Prayer for other reliefs claimed by the plain-
tiff is refused.

Under the circumstances of the case, we direct that the
parties will bear their costs throughout. The res-
pondents are allowed three months' time from the date
of this decree to pay up or deposit the amount due under
this decree.

Appeal allowed.

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Before the Hon'ble Mr. Subba Rao, Chief Justice, the Hon'ble Mr. Justice Shah, the Hon'ble Mr. Justice Sikri, the Hon'ble Mr. Justice Ramaswami and the Hon'ble Mr. Justice Vaidialingam.

CHANDRA BHUSHAN AND ANOTHER ... APPELLANTS,

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THE DEPUTY DIRECTOR OF CONSOLIDATION,
U. P., LUCKNOW AND OTHERS ... RESPONDENTS.

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.)

Constitution of India, (1950), Art. 226—Period for filing Writ petition.

The rule in *Mongey's case* (1) (Writ petitions should be filed as quickly as possible and unless there be, to the satisfaction of the Court, special circumstances requiring extension, within 90 days which is the period fixed for preferring appeals to the High Court) is at best a rule of practice and not a rule of limitation and cannot therefore be applied rigidly in cases where there is nothing to show laches or undue delay on the part of the petitioner.

Civil Appeal No. 973 of 1965 from the Judgment and Decree dated the 5th March, 1962 of the Allahabad High Court in Special Appeal No. 43 of 1962.

B. C. Misra, (D. Goburdhun with him) for the appellants.

C. B. Agarwala, (O. P. Rana, with him) for the Respondents, 1 to 3.

The following judgment of the court was delivered by—

SHAH, J.:—A revision application under s. 48 of the U. P. Consolidation of Holdings Act filed by the appel-

(1) A.I.R. 1957 All. 47.

lants against the order of the Settlement Officer Consolidation was dismissed by the Deputy Director of Consolidation, Allahabad, by order dated the 15th July, 1961. The appellants then moved on 13th November, 1961 the High Court of Allahabad for the issue of a writ of *certiorari* quashing the orders, *inter alia*, of the Consolidation Officer and the Settlement Officer. The petition was summarily rejected by D. S. MATHUR, J., observing that the period of "limitation expired on 7th November, 1961 and no explanation had been furnished why the writ petition could not be filed on 7th November, 1961". A special appeal against that order was dismissed by a Division Bench of the Allahabad High Court. The High Court observed that the petition was dismissed by MATHUR, J., on the ground that it was filed beyond 90 days from the date of the impugned order "after excluding the time taken in obtaining a certified copy of the order and after excluding the time requisite for giving notice to the Standing Counsel under rules of the Court". The High Court further observed "that no attempt * * * had been made to explain why the petition was not moved on 7th November, 1961 which was the date on which it should have been moved in accordance with the principles laid down by the High Court." Against the order of the High Court this appeal is preferred with special leave.

The High Court of Allahabad has not framed any rule prescribing a period of limitation for filing petitions for writs of *certiorari* under Art. 226 of the Constitution. Ordinarily in the absence of a specific statutory rule, the High Court may be justified in rejecting a petition for a writ of *certiorari* against the judgment of a subordinate court or tribunal, if on a consideration of all the circumstances, it appears that there is undue delay. But the aggrieved party should have a reasonable time

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within which to move the High Court for *certiorari*. Sometimes it has been suggested that the remedy by *certiorari* is in the nature of that afforded by writ of error, it will not be issued, or if issued will be quashed or superseded, where, in the absence of special facts or circumstances excusing the delay, the application is not made until after the time within which a writ of error must be prosecuted has elapsed: see Ferris & Ferris—“Extraordinary Legal Remedies” p. 202. The Allahabad High Court in *Mongey v. Board of Revenue, U. P. Allahabad* (1) has consistently with that view laid down the practice that “writ petitions under Art. 226 of the Constitution should be filed as quickly, after the delivery of judgment of the inferior tribunal, as possible. A period of 90 days, which is the period fixed for appeals to the High Court from the judgments of courts below, should be taken as the period for application for the issue of a writ of *certiorari*, and that time can be extended only when circumstances of a special nature, which are sufficient in the opinion of the Court, are shown to exist.” But in the absence of a statutory rule the period prescribed for preferring an appeal to the High Court is a rough measure: in each case the primary question is whether the applicant has been guilty of laches or undue delay. A rule of practice cannot prescribe a binding rule of limitation: it may only indicate how discretion will be exercised by the Court in determining whether having regard to the circumstances of the case, the applicant has been guilty of laches or undue delay.

In the present case the order of the Deputy Director of Consolidation was made on 15th July, 1961, and a petition for review of that order was rejected on 22nd September, 1961. The appellants had to secure certified copies of the impugned orders, and under the rules of the High Court they had to serve upon the Standing Counsel to the State of Uttar Pradesh a notice of the

(1) A.I.R. (1957) All. 47.

intention to move a petition before the High Court. Taking into consideration these two periods, the appellants could have, according to the practice of the High Court, moved the petition on 7th November, 1961. But the petition was moved on 13th November, 1961. D. S. MATHUR, J., rejected the petition being apparently of the opinion that the rule of practice prescribed a rule of limitation. The learned Judge did not consider whether on a review of the circumstances the appellants were guilty of laches or undue delay. In appeal, the High Court affirmed the order.

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There are certain special circumstances which would have normally justified the Court in not insisting upon strict compliance even with its own rule of practice. Originally 7th November, 1961 was declared a working day by the High Court, but by notice issued by the Court on 7th November, 1961, the High Court and its offices were, without previous intimation, closed some time about mid-day for the Diwali holidays, and the Court and its offices re-opened on 13th November, 1961. The petition which was intended to be filed in the High Court was sworn on 12th October, 1961, and an Advocate had, it appears, been engaged by the appellants to lodge the petition, and notice as required by the rules of the High Court was served upon the Standing Counsel. There is no reason to think that the appellants would not have presented the petition on 7th November, 1961 if the offices of the High Court were not closed at 1-00 p.m.

The rule which has been laid down in *Mongey's case*, (1) is at best a rule of practice, and not a rule of limitation. It is true that normally the question whether a petition under Art. 226 of the Constitution for the issue of a writ of *certiorari* had been presented without undue delay or laches is a question for the High Court

(1) A.I.R. (1957) All. 47.

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to decide and this Court would not interfere with the exercise of the discretion of the High Court. But in the present case, there are special circumstances, which justify departure from the rules (i) that MATHUR, J., regarded the rule of practice as a rule of limitation; (ii) that the offices of the High Court were ordered to be closed at 1.00 p.m. on 7th November, 1961, even though originally 7th November, 1961 was declared a working day; and (iii) the appellants had completed all preliminary steps for filing the petition before 7th November, 1961. These circumstances have not been considered by MATHUR, J., nor have they been considered by the High Court. They appear to have exalted a rule of practice into a rule of limitation, and rejected the petition of the appellants without considering whether the appellants could be said to be guilty of laches or undue delay. It may be mentioned that apart from the ground that the petition was not presented within ninety days, there is nothing which indicates that the appellants were guilty of laches or undue delay, nor are there grounds which justified the High Court in holding that it would be unjust to permit a departure from the practice of the Court.

The appeal will therefore be allowed and the order of the High Court set aside. The proceedings will be remanded to the High Court for hearing and disposal according to law. There will be no order as to costs in this Court. The costs in the High Court will be costs in the cause.

Appeal allowed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Wanchoo, the Hon'ble Mr. Justice Bachawat and the Hon'ble Mr. Justice Shelat.

RAM CHAND SPINNING & WEAVING MILLS

... APPELLANT,

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v.

BIJLI COTTON MILLS (P.) LTD., HATHRAS AND
OTHERS ... RESPONDENTS.

(ON APPEAL FROM THE HIGH COURT AT ALLAH-
ABAD).

Code of Civil Procedure (Act V of 1908, ss. 2(2), 47 and O. 21,
r. 84—*Order setting aside auction sale as a nullity for de-
fault of deposit—Whether appealable.*

An order by the executing court setting aside an auction sale
as a nullity by reason of any violation of O. 21, r. 84 of the
Code of Civil Procedure or other mandatory provision amounts
to a final order determining the rights of the parties falling
thereby within the definition of decree under s. 2(2) read with
s. 47 of the Code and is appealable as such.

Mrs. Peliti v. Kanshi Gopal (1) . . . overruled.

Case-law discussed.

Civil Appeal No. 877 of 1964 from the Judgment and
Order dated the 9th May, 1963 of the Allahabad High
Court in Execution First Appeal No. 410 of 1962.

Ravinder Narain, for the Appellant.

J. P. Goyal and *E. C. Agrawala*, for the Respondents
nos. 1 and 2.

(1) A.I.R. 1939 Lah. 219.

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The following Judgment of the Court was delivered by—

SHELAT, J.:—This appeal by special leave raises the question whether an order by an executing Court setting aside an auction sale as a nullity is an appealable order.

In pursuance of a decree passed against the appellant (judgment-debtor) the judgment-creditor took out execution proceedings. An auction sale of the factory belonging to the appellant was ordered by the executing court. In pursuance of that order, the Amin (the auction-officer) held an auction sale on 10th September, 1962. Respondent No. 1 was held to be the highest bidder for Rs.2,45,000. The appellant challenged the auction-sale alleging that the Amin had not realised 1/4th of the sale proceeds immediately after the said auction was closed as required by O. 21, r. 84 of the Code of Civil Procedure. His case was that the Amin realised the said amount and deposited it in the Treasury on 11th September, 1962. The appellant thereafter filed an application under O. 21, r. 84 before the Civil Judge, Aligarh. Respondent No. 1 contested that application stating that he had tendered the said amount immediately after the auction, that the said amount being large the Amin hesitated to accept it in cash as it was too late that day to deposit it in the Treasury. He also alleged that the Amin wanted to know whether he could accept a cheque instead of cash and therefore took Chhotelal, his representative, along with him to the residence of the Munsif, Hathras, to take directions. Leaving Chhotelal in the car outside the Munsif's residence, the Amin went in to consult the Munsif if he could accept a cheque but the Munsif advised him to take cash. Thereafter the Amin returned to the car where he accepted the said amount from Chhotelal and issued there

and then a receipt therefor. The respondent's case therefore was that he offered the amount immediately, that it was no fault of his that the Amin did not then accept it, and that it was paid in any event soon after the auction and therefore payment was in consonance with O. 21, r. 84.

The Civil Judge refused to accept the case of respondent No. 1 and setting aside the auction sale held it to be a nullity. He rejected the report of the Amin that he had accepted the money immediately after seeing the Munsif outside the Munsif's house where Chhotelal was in the car. The Civil Judge thought that the Munsif's evidence did not support the Amin as the Munsif had stated that it was only the Amin who had come to see him. Therefore the evidence of the Amin and Chhotelal that the amount of Rs.61,250 was paid in the car outside the Munsif's house was not free from doubt. What impressed the Civil Judge was the fact that in his report dated the 10th September, 1962 the Amin had not mentioned the fact of his having received the said amount and the receipt issued by him that day. There was however an endorsement at the foot of that report made on 11th September, 1962 in which the Amin had mentioned the fact of his having received the said amount and the receipt having been issued by him on 10th September, 1962. The Civil Judge, however, felt that if he had received that amount on 10th September, 1962, the Amin was bound to have mentioned that fact in the body of that report that very day, that is, on the 10th and that therefore the endorsement was written out as an after thought to support Chhotelal's evidence. Apart from the evidence of the Amin, the Munsif and Chhotelal, there was also the evidence that respondent No. 1 had that day withdrawn Rs.1,51,000 from the Bank and had available with him cash and there was no

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reason why he should not have paid Rs.61,250 from that amount that very day.

Respondent No. 1 filed an appeal against the said order in the High Court. The High Court accepted the Amin's report and his evidence and reversed the judgment and order of the Civil Judge holding that there was no breach of O. 21, r. 84 and that the sale therefore could not be set aside as a nullity. The High Court held—and rightly—that there was no contradiction between the Munsif's evidence and that of the Amin. For, if Chhotelal was waiting in the car outside the Munsif's house the Munsif was not likely to see him and would naturally depose that the Amin alone had come to his house for consulting him. The High Court also rightly held that there was no valid reason to doubt the Amin's report, the said receipt and the evidence that sufficient cash was available with respondent No. 1 from which he had no reason not to pay the amount of Rs.61,250 immediately after the auction and that though some time elapsed after the auction as the Amin went to consult the Munsif the said amount was paid in accordance with O. 21, r. 84.

Counsel for the appellant tried to challenge this finding of fact by the High Court but as the evidence on this question was clear and the High Court's finding was fully justified, we in our discretion under Art. 133 declined to permit him to go into the evidence with a view to reopen the said finding.

The only question which the appellant's Counsel then raised was that the order of the Civil Judge was made under O. 21, r. 84, that that order was not a final but an interlocutory order. It did not conclude the execution proceedings but only ordered a fresh auction sale and therefore no appeal lay before the High Court. He also contended that the sale being contrary to O. 21,

r. 84, it was a nullity and therefore O. 21, r. 90 did not apply. Hence there could be no appeal against the said order. These very contentions were raised before the High Court but they were rejected on the ground that the appellant's application could not be under O. 21, r. 84 and that therefore the application was under r. 90 of that order, that is, that it was an objection to a material irregularity in the conduct and publication of the said sale. The High Court also held that such an objection related to execution of the decree and therefore would fall under s. 47 of the Code and an appeal lay against such an order.

In *Manilal Mohanlal Shah v. Sardar Sayed Ahmed Sayed Mohammad* (1) this Court has held that rr. 84 and 85 of O. XXI being mandatory if they are not complied with there would be no sale at all and the court is bound to order a re-sale. That decision also held that since there would be no sale and the purported sale is a nullity there would be no question of a material irregularity in the conduct of the sale and r. 90 would therefore not apply. An application under r. 90, as held by the High Court therefore would not lie.

The question then is whether s. 47 of the Code would apply. It has been consistently held in a number of decisions by the Privy Council and the High Courts that s. 47 is wide and should be liberally construed so as not to drive the parties to a separate suit and thereby prolong litigation. All questions relating to the execution, discharge or satisfaction of the decree which arise between the parties fall within the scope of this section. The Explanation added to the section in 1956 includes a purchaser at a sale in execution of the decree as a party to the suit. Consistently with the decisions giving a liberal interpretation to this section it has

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been held that an order setting aside an auction sale for non-payment of deposit as provided by r. 85 of O. 21 falls under s. 47 irrespective of whether the purchaser is a decree-holder or a stranger. (See *Nandlal v. Siddiquan*) (1). The High Court of Madras has also held that where an auction purchaser has deposited the balance amount under r. 85 but has failed to lodge a receipt therefor and the court orders re-sale, an application for review of such an order falls under s. 47 and such an order is appealable. (*Veerayya v. Tirichirappalli District Board*) (2). Various High Courts have similarly held that when a sale in execution of a decree whose validity is not questioned is attacked on the ground that it is not merely irregular but illegal and void that must be done by a proceeding under s. 47 and not by an independent suit. [See cases collected in Mulla's C. P. C. 13th ed., Vol. I, p. 236, footnote (i)]. If the order setting aside the sale on the ground that the deposit as provided for under r. 85 was not made falls within the scope of s. 47 there does not appear to be any reason why an order holding the sale to be a nullity on the ground that r. 84 was not complied with cannot also fall under that section.

Under s. 2(2) of the Code a decree is deemed to include the determination of any question falling within s. 47. An execution proceeding no doubt is not a suit but the combined effect of s. 2(2) and s. 47 is that an order passed in execution proceeding is tantamount to a decree in so far as regards the court passing it if conclusively determines the question arising between the parties to the suit (which expression now includes an auction purchaser) and relating to the execution of the decree. Therefore if an order decides a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree it would fall under s. 47 and would be a decree within the meaning of s. 2(2).

(1) A.I.R. 1957 All. 558.

(2) A.I.R. 1961 Mad. 409.

If such an order is a decree it is appealable under s. 96 of the Code.

Reliance was placed on the judgment of the High Court of Bombay in *Manilal Mohanlal Shah v. Sardar Sayed Ahmed Sayed Mohammad* (1), (from which the appeal came up before this Court in *Manilal Mohanlal Shah case* (2)), where the High Court took the view that since it is the duty of an executing court to order re-sale where conditions of r. 84 are not complied with even though the rule does not expressly provide for an application, if the Court sets aside the sale upon an application made to it it can be said to have acted *suo moto* and the order therefore would be under r. 84. It is however not necessary for us to decide whether it is so or not, for, the only question before us is whether such an order amounts to a decree and is therefore appealable. Counsel for the appellant then relied upon *Mrs. Peliti v. Kanshi Gopal* (3) where it was held that such an order was not appealable on the ground (1) that an auction purchaser even if he is not a stranger is not a party to the suit and (2) that such an order setting aside an auction sale would not be one relating to the execution, discharge or satisfaction of the decree and therefore not an order under s. 47. The first ground no longer survives in view of the Explanation added to s. 47. It therefore remains to be seen whether the second ground is a valid ground. In *Bharat National Bank v. Bhagwan Singh* (4) the judgment-debtor raised three contentions: (1) with regard to his objection to the proclamation of sale, (2) the jurisdiction of the executing court, and (3) limitation. The Division Bench which heard them upheld the first contention holding that his objection to the proclamation was valid and therefore ordered a fresh sale but rejected his other two

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(1) 57 Bom. Law Reporter 10.

(2) (1955) 1 S.C.R. 108.

(3) A.I.R. 1939 Lah. 219.

(4) A.I.R. 1943 Lah. 210.

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objections. In an application for leave to appeal to the Privy Council heard by a Full Bench of that High Court, the judgment-debtor contended that he was entitled to leave on the ground that though the first part of the order did not finally determine the rights of the parties the High Court's decision on the rest of his other two contentions amounted to a decree. The Full Bench by a majority decision disallowed the application on the ground that there was no final determination of the execution proceedings as the High Court had ordered a resale and even if the order in regard to the contentions as to jurisdiction and limitation were to be considered to be a final determination the judgment of the High Court could not be divided into parts. The question whether ordering a fresh sale would be a final determination if raised by an auction purchaser was not before the High Court. As regards the judgment-debtor the order obviously was not a final determination as the execution proceedings were not finally concluded. The decision in *Md. Zakaria v. Kishun* (1) relied on by Counsel for the appellant laid down two propositions: (1) that an order under r. 66 of O. 21 was not an appealable order, and (2) that the only orders which are appealable are those which determine the rights of the parties to the execution.

There can be no objection to these propositions. But this decision has no bearing on the contentions raised before us and can therefore be of no assistance. *Mohit Narain Jha v. Thakan Jha* (2) is again a case of an order passed under O. 21 R. 66 refusing to notify a certain lease in the proclamation of sale. There being no determination of the rights of the parties and the order at best being a processual one the High Court was right in holding that such an order was neither a decree nor appealable. The decision in *Radhe Lal v. Ladli Persad* (3) which the counsel referred to does

(1) A.I.R. 1926 All. 268.

(2) I.L.R. 4 Pat. 731.

(3) A.I.R. 1957 Punj. 92.

not also assist him but lays down on the contrary that where a plea which is overruled is the subject of a separate petition under s. 47 and it is a self contained plea with no reference to the other matters in dispute the order overruling such a plea is final as regards that particular objection raised by the judgment-debtor and is appealable. In *Pankaj Kumar v. Nanibala* (1) the High Court was concerned with the question whether the order in question was a final order under Art. 133 of the Constitution. The order against which an appeal to this Court was sought for was one dismissing certain objections raised by the judgment-debtor. The order did not dispose of the execution proceedings in which it was raised and on that ground the High Court held that no appeal lay before this Court and refused to issue the certificate. Thus, except for the decision in *Mrs. J. Peliti v. Kanshi Gopal* (2) none of the decisions relied on by the counsel relates to the question before us and therefore they are not of any assistance.

As to what is a final order was stated by this Court in *Jethanand & Sons v. State of Uttar Pradesh* (3) in the following terms:

“An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the civil proceeding. If after the order the civil proceeding still remains to be tried and the rights in dispute between the parties had to be determined, the order is not a final order within the meaning of Art. 133”.

(1) A.I.R. 1968 Cal. 524.

(2) A.I.R. 1939 Lah. 219.

(3) A.I.R. 1961 S.C. 794.

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Similarly in *Abdul Rahmay v. D. K. Cassim* (8) Sir
GEORGE LOWNDES observed:

"The finality must be finality in relation to the suit. If after the order the suit is still alive in which rights of the parties have still to be determined no appeal lies against it. The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one."

In deciding the question whether the order is a final order determining the rights of parties and therefore falling within the definition of a decree in s. 2(2), it would often become necessary to view it from the point of view of both the parties—in the present case—the judgment-debtor and the auction-purchaser. So far as the judgment-debtor is concerned the order obviously does not finally decide his rights since a fresh sale is ordered. The position, however, of the auction purchaser is different. When an auction-purchaser is declared to be the highest bidder and the auction is declared to have been concluded certain rights accrue to him and he becomes entitled to conveyance of the property through the court on his paying the balance unless the sale is not confirmed by the Court. Where an application is made to set aside the auction sale as a nullity if the court sets it aside either by an order on such an application or *suo motu* the only question arising in such a case as between him and the judgment-debtor is whether the auction was a nullity by reason of any violation of O. 21, r. 84 or other similar mandatory provisions. If the court sets aside the auction sale there is an end of the matter and no further question remains to be decided so far as he and the judgment-deb-

tor are concerned. Even though a resale in such a case is ordered such an order cannot be said to be an interlocutory order as the entire matter is finally disposed of. It is thus manifest that the order setting aside the auction sale amounts to a final decision relating to the rights of the parties in dispute in that particular civil proceeding, such a proceeding being one in which the rights and liabilities of the parties arising from the auction sale are in dispute and wherein they are finally determined by the court passing the order setting it aside. The parties in such a case are only the judgment-debtor and the auction-purchaser the only issue between them for determination being whether the auction sale is liable to be set aside. There is an end of that matter when the court passes the order and that order is final as it finally determines the rights and liabilities of the parties, viz. the judgment-debtor and the auction-purchaser in regard to that sale, as after that order nothing remains to be determined as between them.

An auction sale is held in pursuance of execution proceedings taken out by the judgment-creditor and the order passed by the executing court. Until the decree is satisfied or discharged the execution proceedings cannot be said to have been completed. It is by the payment of sale proceeds resulting from such sale that the decree is satisfied either in part or in whole. That being clearly the position it is difficult to comprehend as to why as held in *Mrs. J. Peliti v. Kanshi Gopal* (1) an order declaring an auction sale as a nullity cannot be said to be one relating to the execution, discharge or satisfaction of the decree within the meaning of section 47.

In our view the order in question was a final order determining the rights of the parties and therefore fell

(1) A.I.R. 1939 Lah. 219.

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within the definition of a decree under s. 2(2) read with s. 47 and was therefore an appealable order. The appeal therefore lay before the High Court. The contentions raised on behalf of the appellant therefore must be rejected.

The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL (FULL BENCH)

Before Mr. Justice J. Sahai, Mr. Justice Pathak and
Mr. Justice G. C. Mathur.

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Allahabad University Act, III of 1921, ss. 6, 12(4) and Chap. XX of the Statutes—Disciplinary proceeding—Breach of discipline by a student—Vice-Chancellor—If required to act quasi-judicially in awarding punishment.

(*Per J. SAHAI, J. and PATHAK, J. and G. C. MATHUR, J. Contra*):—The powers of punishment of the Vice-Chancellor must be judged in the setting of s. 6 of the Act. The Vice-Chancellor cannot remove a student from the roll only on his subjective opinion. Under cl. 22 of the Statutes he has to consult the Dean of the Student Welfare while cls. 8 and 31(a) provide for assistance to be rendered to the Vice-Chancellor by the Dean and the Proctor which the Vice-Chancellor may require in the exercise of his disciplinary authority.

An investigation being implied and there being an express provision for consultation, it is implicit that the student should be heard before action is taken against him for otherwise the investigation will be a farce and the consultation a mockery of the provision.

In the process of deciding whether or not to punish a student, or the nature of the punishment, the Vice-Chancellor cannot avoid objective determination of certain facts. He may be called upon to consider misconducts of serious nature having serious consequences. The imperative provision for consultation with the Dean and the provision for assistance by the Dean and the Proctor clearly shows that some sort of investigation is contemplated and is implied and that the student concerned should be heard before any action is taken against him. Consequently the Vice-Chancellor is required to act judicially.

Ramesh Chandra Chaube v. Principal, B. B. I. College (1) over-ruled and *Board of High School and Intermediate Education v. Ghanshyam Das Gupta* (2), followed.

Special Appeal No. 682 of 1964 from the Judgment of Dwivedi, J. in Civil Miscellaneous Writ Petition No. 5713 of 1963 decided on 20th August, 1964.

(1) A.I.R. 1953 All 90.

(2) A.I.R. 1962 S.C. 1110.

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VERSITY OF
ALLAHABAD*A. P. Pandey* and *S. D. Pandey*, for the Appellant.*G. P. Singh* for the Respondent.

JAGDISH SAHAI, J.:—The following question has been referred to us by the Division Bench hearing special Appeal No. 682 of 1964, which is directed against the judgment of S. N. DWIVEDI, J., dated 20th August, 1964 dismissing writ petition No. 5713 of 1963 filed by the appellant Gajadhar Prasad (hereinafter referred to as the appellant).

“Whether the Vice-Chancellor of the Allahabad University is required to perform *quasi-judicial* functions in inflicting punishments upon students for breach of discipline?”

By means of an order dated 2nd December, 1963 the Vice-Chancellor of the Allahabad University (Dr. Balbhadra Prasad) expelled the appellant “from the University with immediate effect” and ordered that he be not admitted to any class or examination of the University in future. One of the submissions made before the Division Bench was that the appellant had not been heard before the order mentioned above was passed against him. It is under these circumstances that the question arose whether the Vice-Chancellor performed purely administrative functions in inflicting punishments upon students for breach of discipline or is required to perform *quasi-judicial* functions.

S. 12(4) of the Allahabad University Act (hereinafter referred to as the Act, reads:

“The Vice-Chancellor shall exercise general control over the affairs of the University and shall be responsible for the due maintenance of discipline therein.”

Chap. XX of the statutes deals with discipline and reads:

“The Vice-Chancellor shall be responsible for maintaining discipline in the university and he shall have all powers necessary for the purpose.”

These are the only provisions dealing with discipline in the University and the power of the Vice-Chancellor to inflict punishment on students. The Act, the statutes, the Ordinances and the Regulations do not expressly provide for calling for an explanation and hearing a student before inflicting punishment upon him nor do they provide the procedure required to be followed by the Vice-Chancellor in such a matter. Actually, it is nowhere expressly stated that the Vice-Chancellor can punish a student. The power to punish is inferred from the words "and he shall have all powers necessary for the purpose" occurring in Chap. XX of the statutes and from the requirement of that statute as also of s. 12(4) of the Act that the Vice-Chancellor shall be responsible for the due maintenance of discipline in the University.

The Allahabad University, like other Universities, is an educational institution. Its primary function is to teach students and conduct examinations. Such power to punish its students as the Vice-Chancellor has is to secure smooth and proper running of the University. As is clear from the language of s. 12(4) of the Act and Chap. XX of the statutes that punishment can only be inflicted upon a student if he has breached the discipline of the University and for no other reason. The punishment powers of the Vice-Chancellor must be judged in the setting of s. 6 of the Act which expressly provides that the University is open to all and ensures that no one would arbitrarily be deprived of the right to study in the University and the settled law that the right to receive education is a basic right in a democracy: (see *S. M. N. Tripathi v. Dy. Inspector General of Police* (1)). The Vice-Chancellor cannot remove a student from the rolls of the University only because in his subjective opinion the student is an undesirable person or that

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he does not like the student. Cl. 22 of the Statutes provides that "the Dean of the Student Welfare shall be consulted by the Vice-Chancellor before taking action against a student on disciplinary grounds". Consultation with the Dean of the Student Welfare is thus imperative and to that extent the Vice-Chancellor cannot act unilaterally. Cl. 8 of the Statutes deals with the appointment of the Proctor and Assistant Proctors and provides that the Vice-Chancellor may "take from the Dean of the Student Welfare and the Proctor such assistance as he might consider necessary." Cl. 31(a) of the Statutes provides that "the Proctor shall assist the Vice-Chancellor in the exercise of his disciplinary authority in respect of the students of the University and shall also exercise such powers and perform such duties in respect of discipline as may be assigned to him by the Vice-Chancellor in this behalf." That being the statutory position, the question to consider is whether the Vice-Chancellor, while punishing a student, has to perform an administrative or a *quasi-judicial* act. As pointed out earlier, there is no express provision on the point. Generally a statute does not provide, in so many words, that the authority passing the order is required to act judicially. That can only "be inferred from the express provisions of the statute in the first instance in each case and no circumstance alone will be determinative of the question. The inference whether an authority acting under a statute, where it is silent, has a duty to act judicially will depend upon the express provisions of the statute read along with the nature of the rights affected, the manner of disposal provided, the objective criterion, if any, to be adopted, the effect of the decision on the persons affected and other indicia afforded by the statute." [See *Board of High School and Intermediate Education v. Ghanshyam Das Gupta* (1)]. In the process of deciding whether or not to punish a student, and if to punish, what punishment to award, the Vice-

(1) A.I.R. 1962 S.C. 1110.

Chancellor cannot avoid objective determination of certain facts. It is only when he is fully satisfied that those facts have been established that he can proceed to punish the student.

There can be no escape from the conclusion that whether or not a student has breached the discipline of the University can only be decided objectively on the basis of the material available and is not capable of being determined on the subjective opinion of the Vice-Chancellor. Breach of discipline involves misconduct of some kind. How can the Vice-Chancellor determine whether or not a student is guilty of misconduct unless he has before him material in support of the alleged misconduct and until he has examined that material and satisfied himself that the same is trustworthy and sufficient to enable him to hold the student guilty of the misconduct charged. It is thus clear that the Vice-Chancellor can carry out his duty of deciding whether or not the student is guilty of misconduct only by judging the material in his possession and it is equally clear that he would not be able to discharge this duty properly and fairly or decide the matter justly without hearing the student. As was pointed out by their Lordships in *Board of High School and Intermediate Education v. Ghanshyam Das Gupta* (1), in some cases, the misconduct attributed to the student may be of a very serious nature, "for example impersonation, commission of fraud and perjury". It may be assault on a teacher or a fellow student or theft. The Vice-Chancellor's "decision in matters of such seriousness may even lead in some cases to the prosecution of the student in courts." Considering the serious consequences to the student and the serious nature of the misconduct which the Vice-Chancellor may find in some cases it must be held that the Vice-Chancellor is required to act judicially. The view I am taking finds full support from *Board*

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of *High School and Intermediate Education v. Ghanshyam Das Gupta* (1). It is true that there is no *lis* in the present case in the sense that there are not two contesting parties before the Vice-Chancellor and the matter rests between him and the student but in view of the nature of the duty to be performed by the Vice-Chancellor and the serious consequences that may befall the student, it cannot but be held that the Vice-Chancellor has to act judicially. As was pointed out by DAS, J. in *Province of Bombay v. Khushaldas S. Advani* (2) the mere fact that there are no two parties would not necessarily render the duty to be performed, administrative. DAS, J. observed as follows:

"The principles as I apprehend are:

(i)

(ii) That if a statutory authority has power to do any act which will prejudicially affect the subject, then although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a *quasi-judicial* act provided the authority is required by the statute to act judicially.

In other words, while the presence of two parties besides the deciding authority will *prima facie* and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of *quasi-judicial* act if the authority is nevertheless required by the statute to act judicially."

In *Board of High School v. Ghanshyam Das* (1) the same view was reiterated and the passage extracted above relied upon.

(1) A.I.R. 1962 S.C. 1110.

(2) 1950 S.C.R. 621.

The fact that the law clearly provides for assistance to the Vice-Chancellor from the Dean of Students Welfare and the Proctor in disciplinary proceedings against a student clearly shows that some sort of an investigation is contemplated and the circumstance that the law is imperative that the Vice-Chancellor shall consult the Dean of the Student Welfare clearly implies that there must be material on the basis of which a consultation is possible. An investigation being implied and there being an express provision for consultation, it is implicit that the student should be heard before action is taken against him for otherwise the investigation will be a farce and the consultation a mockery of the provision.

Mr. G. P. Singh, who has appeared for the University, has contended that *Board of High School v. Ghanshyam Das* (1) is distinguishable on the ground that in that case the Supreme Court had to consider the statutory provisions governing the Board of High School and Intermediate Education and not the provisions applicable to the Allahabad University. No two cases can be on exactly the same facts. The decision in *Ghanshyam Das's* case (1) lays down the tests which would determine whether or not an authority has to act judicially. That was also a case where there was no *lis* in the sense that there were only two parties, i.e., the examinee and the Board and there was no express provision requiring the authority to act judicially. The two factors on which that decision rests, i.e. (1) the authority in performing its duties had, because of the very nature of the duty, to judge materials, and (2) the consequences to the examinee could be very serious, exist in the present case also. I can find no ground to distinguish *Ghanshyam Das's* case (1) from the one before us. In fact, ever since *Board of High School v. Ghanshyam Das* (1) has

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been decided by the Supreme Court, the principles enunciated in that case have been the basis of decisions in all cases where there was a dispute similar to one before us between students or examinees on the one hand and the University on the other.

In *R. Nagalingam v. University of Madras* (1) the examination of a student had been cancelled and he had been debarred from undergoing course of studies for two years and appearing in an examination during that period by the Madras University. Relying upon *Board of High School v. Ghanshyam Das* (2), the single Judge of the Madras High Court held that the authority had to act judicially and quashed the impugned order. The same view was taken by that Court in *E. V. Kumar v. The University of Madras* (3). In *Ajit Singh v. Ranchi University* (4) an order of the Ranchi University was quashed by the Patna High Court, following *Board of High School v. Ghanshyam Das* (2).

In *Ramesh Kapur v. Punjab University* (5), *Ram Chandra Singh v. Punjab University* (6) and *Karamjit Kaur v. The Punjab University* (7) following *Board of High School v. Ghanshyam Das*, (2) the Punjab High Court held that the University had to act judicially.

In all these cases, the statutory provisions were different from those in *Board of High School v. Ghanshyam Das* (2) and yet the High Courts concerned held that the matter stood concluded by the Supreme Court decision in *Ghanshyam Das's* case (2).

Dipa Pal v. University of Calcutta (8) was approved by the Supreme Court in *Ghanshyam Das's* case (1). The Calcutta High Court held in that case that the functions performed by the Calcutta University were quasi-

(1) A.I.R. 1963 Mad. 31.

(3) A.I.R. 1964 Mad. 460.

(5) A.I.R. 1965 Pun. 120 (F.B.).

(7) A.I.R. 1964 Pun. 327.

(2) A.I.R. 1962 S.C. 1110.

(4) A.I.R. 1964 Pat. 291.

(6) A.I.R. 1963 Pun. 480.

(8) A.I.R. 1962 Cal. 594.

judicial because the decision of the University authorities affected not only the rights of the petitioner as an examinee but also her right to reputation. In *University of Ceylon v. Fernando* (1) the Privy Council held that the "authority concerned must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means, it must employ them. If it is left without express guidance it must still act honestly and by honest means". These cases also support the view that I am taking.

Mr. G. P. Singh placed reliance upon *Jogendra Rai Kishore v. University of Allahabad* (2) where a Division Bench held that:

"It is, therefore, clear from a perusal of these provisions that the Vice-Chancellor is the executive head of the University and is primarily responsible for the maintenance of discipline among the students of the University. For the purpose of maintaining discipline he is possessed of all the necessary powers There is nothing in the statute which casts any duty upon the Vice-Chancellor to act judicially."

The decision rests on the circumstance that there was no provision in the statute casting "any duty upon the Vice-Chancellor to act judicially". As was pointed out in *Ghanshyam Das's* case (3) by the Supreme Court, "the statute is not likely to provide in so many words that the authority passing the order is required to act judicially" and that it has got to be inferred from the express provision of the statute and other circumstances as to whether or not the authority has to act judicially. The Division Bench deciding *Jogendra Raj's* case (1) did not consider the question that a right of hearing is implicit in the nature of the proceedings which the Vice-Chancellor has to take before punishing a student.

(1) (1960) 1 All. E.R. 681.

(2) A.I.R. 1956 All. 503.

(3) A.I.R. 1962 S.C. 1110.

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The next case on which *Mr. Singh* placed reliance is *Keshab Chandra v. Inspector of Schools* (1) where it was held as follows:

"To hold that a student has a legal right to come to a Court of law and require the head of the institution to justify his action where he has meted out some punishment or taken any disciplinary action will be subversive of all discipline in the schools and colleges this Court will not interfere in the internal autonomy of educational institutions."

Since that case was decided, a lot of case-law, including the decisions of the Supreme Court has developed on the point and the consideration that interference by the High Court "will be subversive of all discipline in the schools and colleges" cannot justify ignoring the statutory provisions and seeing to it that the University and the School authorities act within the limits of their power. Besides, writ in *Keshab Chandra's* case (1) was refused not on the ground that the Court was not competent to issue it, but on the ground that the Court would not like to interfere in such matters.

Another case of this Court, on which *Mr. Singh* relied, is *Ramesh Chandra Chaube v. Principal, B. B. I. College* (2) where it was observed:

"There is a tendency of indiscipline in the student community and it would be subversive of discipline if this Court were to interfere with the action taken by the heads of institutions in the interests of discipline. . . . There is no guarantee in the Constitution that if a student is studying in any institution then he has a right to continue his education in that particular institution, even though he may not be acceptable to the authorities of the institution."

(1) A.I.R. 1953 All. 623.

(2) A.I.R. 1953 All. 90.

With great respect to the learned Judges who decided it, no reasons have been given for the view taken in this case. In my judgment, the decision is not correct. The considerations which are relevant and important and which found favour with the Supreme Court do not appear to have been placed before the Bench hearing the case.

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In any case, none of the three Allahabad cases cited above by *Mr. Singh* can be considered to be good law in view of the decision of the Supreme Court in *Ghanshyam Das's* case (1).

The last Allahabad case on which *Mr. Singh* relied is *S. M. N. Tripathi v. Dy. Inspector General of Police* (2). In my judgment, that case has no application to the facts before us. It was not a case of a student or an examinee in an educational institution or a University but was that of a police cadet who was expelled from the Police College under the orders of the Principal who is a Deputy Inspector General of Police. That decision is based on its own facts.

Mr. Singh then cited *Board of High School and Intermediate Education, U. P. v. Bagleshwar Prasad* (3). In my judgment that decision does not support the case of the University that the Vice-Chancellor, while punishing a student, performs administrative and not *quasi-judicial* functions. Actually the Supreme Court held that:

“Enquiries held by domestic Tribunals in such cases must, no doubt, be fair and students against whom charges are framed must be given adequate opportunities to defend themselves, and in holding such enquiries, the Tribunals must scrupulously follow rules of natural justice; but it would, we

(1) A.I.R. 1962 S.C. 1110.

(2) 1964 A.L.J. 554 (F.B.).

(3) 1963 A.L.J. 676 S.C.

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think, not be reasonable to import into these enquiries all considerations which govern criminal trials in ordinary courts of law."

The decision, therefore, supports the submission made on behalf of the appellant that the Vice-Chancellor has to act judicially, and that the appellant is entitled to adequate opportunity to defend himself.

In the end, *Mr. Singh* relied upon *Lala Shri Bhagwan v. Ram Chand* (1). That was a case under the U. P. (Temporary) Control of Rent and Eviction Act and their Lordships had to consider the question whether in proceedings under s. 7-F of that Act, before the State Government, the principles of natural justice applied and the parties were entitled to a reasonable opportunity of being heard. Their Lordships held that they were so entitled. I can find nothing in that case which may support the submissions made by *Mr. Singh*.

I would like to point out that the argument that the head of an educational institution has an absolute discretion, so far as disciplinary action against the boys was concerned, was rejected in *Hot v. Governors of Haileybury College* (2) where FIELD, J. observed:

"Such a power would be far too great and dangerous, viz., that any boy at school be liable to be branded for life by expulsion simply because the matter, on his sole authority and discretion—however distinguished he may be—had come to the conclusion that such a course was necessary for the wellbeing of his school. Such absolute discretion can never be permitted."

As is apparent from the note of the Editor in *Fitzgerald v. Northcote* (3) "the Courts rather lean against an arbitrary discretionary power of removal or expulsion, and it is only yielded to where expressly conferred by a founder. In such a case, no doubt where the trustees

(1) 1965 A.L.J. 353 (S.C.).

(2) (1888) 4 T.L.R. 623.

(3) (1865) 176 E.R. 734

have, by the foundation, the power to remove at their discretion, they may remove without assigning any reason, if they do not act from corrupt or improper motives. But where there is not such a power and the power is to remove for neglect, misbehaviour or other good cause, the trustees have not a power of arbitrary dismissal; but only for just cause, which they are bound to exercise in a mode of proceeding according to principles of right, and to general rules applicable to the administration of justice by the Law of England". This view was accepted by the Orissa High Court in *Ramesh Chandra Sahu v. N. Padhy* (1).

The Allahabad University is a public institution run mostly by Government funds. There is nothing in the Act, the statute, the ordinances and the Regulations expressly or by necessary implication conferring on the Vice-Chancellor the power to punish a student without giving an opportunity of being heard.

Having given the matter my anxious consideration, I answer the question referred to us by saying that the Vice-Chancellor of the Allahabad University is required to perform *quasi-judicial* functions in inflicting punishments upon students for breach of discipline. I would direct that the costs should abide the result.

PATHAK, J.:—I agree with my brother JAGDISH SAHAI. The power exercised here by the Vice-Chancellor is a disciplinary power. In the exercise of that power he expelled the appellant from the University and denied him future admission to any class or examination of the University. The power to do so is referable to s. 12(4) of the Allahabad University Act, which entrusted to the Vice-Chancellor general control over University affairs and also the responsibility for maintaining discipline in the University. The responsibility in the Vice-Chancellor for maintaining discipline is reiterated in Chap. XX of the Statutes and it specifically

(1) A.I.R. 1959 Orissa 196.

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declares that he shall have all powers necessary for the purpose. In his Cooley Lectures, Prof. Wade has referred to the disciplinary power as "a power of punishment as well as of control" and emphasises that "it seems especially necessary that it should be made subject to the fundamental rules of fairness in the manner of its exercise" (1). The exercise of a power of punishment necessarily calls for the application of the principles of natural justice. That proposition I think, has now become so well settled as to have become crystallised into a rule of law. A charge is levied against a person of the commission of some misconduct or wrong and that is followed by punishment. Between the charge and the punishment the rule of the law interposes the necessity of an enquiry. That enquiry must enable the person charged not only to know what is the wrong or misconduct alleged against him but also to be heard in his defence. It was pointed out by the Judicial Committee in *De Verteuil v. Knaggs* (1):

"Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice."

There can be little doubt that disciplinary action taken against a student can, in certain circumstances, lead to severe results and grievously affect his future. It is not necessary to refer to specific instances. I shall content myself merely by referring to the observations of the Supreme Court in *Board of High School and Intermediate Education v. Ghanshyam Das Gupta* (2) where it was pointed out that the effect of disciplinary action could, in an extreme case, blast the career of a young

(1) (1918) A.C. 557, 560.

(2) A.I.R. 1962 S.C. 1110.

student for life and could, in any case, attach a serious stigma on him capable of damaging him in later life. It is true that the observations were made in a case somewhat different on the facts than the one before us. It was concerned with a case where a student had been penalised for having adopted unfair means in an examination. To my mind, however, there is no difference in principle when the measure adopted is intended to punish the student for gross misbehaviour and indiscipline. In both cases, before action can be taken, it is necessary for the authority concerned to inquire into the charge against the student and upon the basis of material obtained during that inquiry to determine whether the charge is established. Although the necessity of an enquiry in itself may not always lead to the conclusion that the process is *quasi-judicial* calling for the application of the principles of natural justice, if the disciplinary action is considered with reference to its consequences upon the student it seems inescapable that the statutory provision vesting that power in the authority implies *quasi-judicial* functions. It is not necessary, as was held by the House of Lords in *Ridge v. Baldwin* (1), that the statute should contain an express provision requiring the authority to act judicially. That requisite may be discerned, as the Supreme Court pointed out in *Ghanshyam Das Gupta's case* (2), from "the nature of the rights affected, the manner of disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute". This was re-emphasised by the Supreme Court in *Associated Cement Companies Ltd., Bhupendra Cement Works, Surajpur v. P. N. Sharma* (3) where the view expressed by the House of Lords in *Ridge v. Baldwin* (1) was adopted, and reference to that view was also made by the Supreme

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(1) L.R. 1964 A.C. 40

(2) A.I.R. 1962 S.C. 1110.

(3) Civil Appeal no. 44 of 1964 decided on Dec. 9, 1964.

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Court in *Lala Shri Bhagwan v. Ram Chand* (1). In *Calcutta Dock Labour Board v. Jafar Imam* (2) the Supreme Court again considered the nature or character of the proceeding which a statutory authority or body must adopt in exercising its disciplinary power for the purpose of terminating the employment of its employees, and held that:

"In ascertaining the nature of such proceedings with a view to decide whether the principles of natural justice ought to be followed or not the tests laid down by Lord REID in *Ridge v. Baldwin* (1) are relevant."

The disciplinary power in that case was exercised for the purpose of terminating the services of the appellant's employees, but the principles underlying the tests apply equally to the case where disciplinary action is taken in other fields. In his excellent discussion on the subject in his "Judicial Review of Administrative Action" Professor S. A. de Smith refers to a whole range of cases where the exercise of disciplinary authority by ecclesiastical, military, police, medical and other bodies has in various forms of proceedings been characterised as judicial and subjected to review by the courts. It is true that it is a very rare case indeed where the Courts in England have held that a *quasi-judicial* procedure is involved in disciplinary proceedings against school or university students, but in the countries to which the common law has migrated its influence in that field is already being markedly felt. Professor de Smith refers to *Schoonwinkel N. O. v. Fouche, N. O.* (3) and *Fernando v. University of Ceylon* (4). The latter case was carried in appeal to the Judicial Committee by the University of Ceylon, and it was not disputed there that an enquiry against a student who was alleged to have

(1) 1965 A.L.J. 353.

(2) Civil Appeal no. 560 of 1964.

(3) (1954) 4 S.A. 92 (South Africa), decided on March 22, 1965.

(4) (1957) 58 New L.R. 265 (Cey).

acquired knowledge of a passage in one of the examination papers before taking the examination was a *quasi-judicial*, and not an administrative, proceeding: See *University of Ceylon v. Fernando* (1).

The decision of this Court in *Jugendra Raj Kishore v. University of Allahabad* (2) does not, I say with respect, proceed upon a correct view of the law. As my brother JAGDISH SAHAI has pointed out, the decision of the Supreme Court in *Ghanshyam Das Gupta's* case (3) has taken a different view altogether, and the Bench which decided *Jugendra Raj Kishore's* (2) case did not have the benefit of the Supreme Court decision. As regards the observation of this Court in *Keshav Chandra v. Inspector of Schools* (4) that a student has no legal right to come to a Court of law and require the head of an institution to justify disciplinary action against the student, that observation was prompted by the reluctance of the Courts to interfere in every case of disciplinary action by educational institutions. Moreover, in that case the Court found that the Principal had not taken any disciplinary action. If this Court can be said to have held in that case, and in *Ramesh Chandra Chaube v. Principal, Bipin Behari Intermediate College-Jhansi* (5), that no petition would lie under Art. 226 of the Constitution for redress to a student complaining of disciplinary action, those cases do not, I think, lay down the correct law.

I answer the question referred to us in the affirmative.

G. C. MATHUR, J.:—The following question has been referred for opinion to this Full Bench:

“Whether the Vice-Chancellor of the Allahabad University is required to perform quasi-judicial functions in inflicting punishments upon students for breach of discipline?”

(1) (1960) 1 A.E.R. 681.

(2) A.I.R. 1956 All 503.

(3) A.I.R. 1962 S.C. 1110.

(4) A.I.R. 1953 All 623.

(5) A.I.R. 1953 All 90.

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The appellant was a student of the Allahabad University. In the academic session 1963-64 he was a student of the M. A. (Final) (Ancient History) Class of the University and was also preparing for the LL. B. (Previous) Examination as an ex-student. By an order dated 2nd December, 1963, the Vice-Chancellor expelled the appellant from the University and directed that he be not admitted to any class or examination of the University in future. Thereupon, the appellant filed C. M. Writ No. 5713 of 1963 in this Court, praying that an order, direction or writ in the nature of *certiorari* be issued quashing the order of the Vice-Chancellor dated 2nd December, 1963. By judgment dated 20th August, 1964, DWIVEDI, J., dismissed the writ petition. Before the learned Single Judge it was contended on behalf of the University that the disciplinary proceedings before the Vice-Chancellor were not *quasi-judicial* proceedings and as such principles of natural justice did not apply to them. In support of this contention, two Division Bench decisions of this Court reported in *Ram Chandra Roy v. University of Allahabad* (1) and *Jogendra Rai Kishore v. University of Allahabad* (2) were relied upon. The learned Single Judge did not go into the question whether the proceedings before the Vice-Chancellor were *quasi-judicial* proceedings or not as he was of opinion that, even if they were so, the petitioner had been given an ample opportunity of being heard. Against the judgment of the learned Single Judge the appellant preferred Special Appeal No. 682 of 1964. Before the Bench hearing the appeal the question whether the Vice-Chancellor, while taking disciplinary proceedings against a student, was required to act *quasi-judicially* or not was again raised and reliance was again placed on the abovementioned two decisions. On behalf of the appellant it was contended that these decisions were no longer good law in view of subsequent

(1) A.I.R. 1956 All. 46

(2) A.I.R. 1956 All. 503.

decisions of the Supreme Court, particularly that reported in *Board of High School and Intermediate Education, U. P. v. Ghansyam Das Gupta* (1). Considering the importance of the question raised, the Division Bench considered it proper to refer the question for opinion to a Full Bench.

The importance of deciding whether a statutory tribunal or authority is required to act *quasi-judicially* or not is that, in the former case, its orders are liable to control by *certiorari* if it purports to act without jurisdiction or in excess of it or in violation of the principles of natural justice or commits any error of law apparent on the face of the record. The writ of *certiorari* is a well known ancient high prerogative writ that used to be issued by the Courts of the King's Bench to correct the errors of inferior courts strictly so called. Gradually, the scope of these writs came to be enlarged so as to enable the superior courts to exercise control over various bodies which were not, strictly speaking, courts at all but which were by statute, vested with powers and duties which resembled those that were vested in the ordinary inferior courts.

In *the King v. The Electricity Commissioners* (2), Atkin L. J. has laid down the following test for determining when a statutory body or authority is subject to the writ of *certiorari*:

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject, to the controlling jurisdiction of the King's Bench Division exercised in these writs".

The Supreme Court has, in *The Province of Bombay v. Khushaldas S. Advani* (3), considered at length the

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(1) A.I.R. 1962 S.C. 1110.

(2) (1924) 1 K.B. 171.

(3) 1950 S.C.R. 621.

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question as to when and in what circumstances administrative or executive authorities are required to act in a *quasi-judicial* manner. S. R. DAS, J. (as he then was) laid down the following tests:

"(1) That if a statute empowers an authority, not being a court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a *quasi-judicial* act; and

"(2) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a *quasi-judicial* act provided the authority is required by the statute to act judicially."

In several subsequent decisions, the Supreme Court has approved and applied these tests.

The question, therefore, which has to be considered, is whether, in the present case, any one of these tests is applicable and is satisfied. There can be no doubt that, when the Vice-Chancellor proceeds to take disciplinary action against a student, he performs an administrative function. If any one of the above two tests is found to be applicable to the exercise of his functions by the Vice-Chancellor, it must be held that he is required to act *quasi-judicially*. It has not been contend-

ed before us, nor could it be properly contended, that any *lis* or contest between two parties exists or comes into being when the Vice-Chancellor takes disciplinary action against a student. The first of the above two tests is not applicable to these proceedings at all. In order to determine whether the second test is applicable and whether the Vice-Chancellor has a duty to act *quasi-judicially*, the provisions of the relevant statutes have to be examined.

The powers of the Vice-Chancellor are to be gathered from the Allahabad University Act, 1921, and from the statutes framed under that Act. The relevant provisions are set down below:

"S. 12(2)—It shall be the duty of the Vice-Chancellor to ensure that faithful observance of the provisions of this Act, the Statutes and the Ordinances and he shall, without prejudice to the powers of the Chancellor under s. 42, possess all such powers as may be necessary in that behalf.

S. 12(4)—The Vice-Chancellor shall exercise general control over the affairs of the University and shall be responsible for the due maintenance of discipline therein.

Cl. (8) of the Statute—Powers—The Vice-Chancellor shall, where the power in this regard has been delegated by the Executive Council, appoint the Proctor and such number of Assistant Proctors as might be necessary. The appointment of the Assistant Proctor shall be made in consultation with the Proctor. The Vice-Chancellor shall, in exercise of his powers and the discharge of his duties under s. 12(4) of the Act, take such assistance from the Dean of Student Welfare and the Proctor as he might consider necessary.

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Cl. (22) of the Statute—The Dean of Student Welfare shall be consulted by the Vice-Chancellor before taking action against a student of disciplinary grounds.

Cl. (31) of the Statute : 31 (a)—The Proctor shall be appointed from amongst the teachers of the University by the Executive Council on the recommendation of the Vice-Chancellor or by the Vice-Chancellor where the power of appointment in this regard has been delegated to him by the Executive Council. The Proctor shall assist the Vice-Chancellor in the exercise of his disciplinary authority in respect of students of the University, and shall also exercise such powers and perform such duties in respect of discipline as may be assigned to him by the Vice-Chancellor in this behalf.

(31) (b)—The number of Assistant Proctors who will assist the Proctor shall be fixed by the Executive Council, from time to time but shall not exceed eight.

(31) (c)—The Assistant Proctors shall be appointed by the Executive Council or by the Vice-Chancellor, where the power in this regard has been delegated to him by the Executive Council, from amongst the teachers of the University after considering the recommendation of the Proctor.

Chap. XX of the Statute—Discipline—The Vice-Chancellor shall be responsible for maintaining discipline in the University and he shall have all powers necessary for the purpose.”

The Act and Statutes do not, in so many words, provide that the Vice-Chancellor is required to act *quasi-judicially* when exercising his powers of taking disciplinary action against students. The duty to act judicially, if any, can only be inferred from the express provisions of the Act and Statutes. The provisions set out

above do not lay down the procedure to be followed in taking disciplinary action; they do not require the Vice-Chancellor to find the existence of any particular facts before punishing any student; they do not lay down the punishments that may be imposed by the Vice-Chancellor; nor do they prescribe the conditions under which any particular punishment may be inflicted. What is the procedure to be followed, what are the acts which amount to indiscipline and what is the nature and *quantum* of punishment that may be imposed in a particular case are all matters which have been left to the discretion of the Vice-Chancellor. In these circumstances, it is difficult to say that the Act and the Statutes require the Vice-Chancellor to act *quasi-judicially* in proceedings for disciplinary action.

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It is contended by the appellant that the very nature of the power conferred upon the Vice-Chancellor is such that it can only be exercised *quasi-judicially*. It is said that the Vice-Chancellor must objectively decide whether a student, against whom action is proposed to be taken, has done something or omitted to do something which amounts to an act of indiscipline, and that, if the Vice-Chancellor makes an order against a student it is likely to have very serious consequences for him. From these two factors, we are asked to infer that the Vice-Chancellor is required to act *quasi-judicially*. In my opinion, these factors are not sufficient to enable one to draw such an inference. It is well settled by the decisions of the Supreme Court that merely because an authority has to determine some question of fact and that such determination affects the rights of persons, its decision is not *quasi-judicial* unless there is a further duty upon the authority to act judicially. LORD

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HEWART, C. J. has observed in *Rex v. Legislative Committee of the Church Assembly* (1) as follows:

"In order that a body may satisfy the required test, it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially."

The above passage was quoted with approval by LORD RADCLIFFE in delivering the judgment of the Privy Council in *Nakkuda Ali v. M. F. de S Jayaratne* (2) This view was accepted and followed by the Supreme Court in *Province of Bombay v. Khushaldas S. Advani* (3) as will appear from the following observations made by the learned Judges constituting the Bench in that case:

KANIA, C. J. (with whom PATANJALI SHASTRI, J. agreed) at p. 225—"The respondent's argument that whenever there is a determination of a fact which affects the rights of parties, the decision is *quasi-judicial* does not appear to be sound

. It is broadly stated that when the fact has to be determined by an objective test and when that decision affects rights of some one, the decision or act is *quasi-judicial*. This last statement overlooks the aspect that every decision of the executive generally is a decision of fact and in most cases affects the rights of some one or the other. Because an executive authority has to determine certain objective facts as a preliminary step in the discharge of an executive function, it does not follow that it must determine those facts judicially. When the executive authority has to form an opinion about an ob-

(1) (1928) 1 K.B. 411.

(2) 1951 A.C. 66

(3) A.I.R. 1950 S.C. 222.

jective matter as a preliminary step to be exercised of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of *certiorari*."

FAZL ALI, J., at page 229—

"The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference and the real test is: Is there any duty to decide judicially."

MAHAJAN, J., approved the following observations of the Bombay High Court:

"In other words, the duty cast must not only be to determine and decide a question, but there must also be a duty to determine or decide that fact judicially."

S. R. DAS, J., at page 257—

"... the two kinds of acts have many common features. Thus a person entrusted to do an administrative act has often to determine questions of fact to enable him to exercise his power. He has to consider facts and circumstances and to weigh pros and cons in his mind before he makes up his mind to exercise his power just as a person exercising a judicial or *quasi*-judicial function has to do. Both have to act in good faith. A good and valid administrative or executive act may well be and is frequently made dependent by the Legislature upon a condition or contingency which may involve a question of fact, but the question of fulfilment of which may, nevertheless, be left to the subjective opinion or satisfaction of the executive authority, as was done

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in the several ordinances, regulations and enactments considered and construed in the several cases referred to above. The first two items of the definition given by Atkin L.J. may be equally applicable to an administrative act. The real test which distinguishes a *quasi-judicial* act from an administrative act is the third item in Atkin L.J.'s definition, namely, the duty to act judicially."

The case of *Radeshyam Khare v. State of Madhya Pradesh* (1), again, very clearly establishes that merely because an administrative authority is required to determine some question of fact which affects the rights of others, the decision cannot be said to be *quasi-judicial*. In that case, the State Government had passed an order under s. 53-A of the C. P. and Berar Municipalities Act appointing a servant of the Government as Executive Officer of the Municipal Committee of Dhantari. S. 53-A reads as follows:

"53-A—(1) If a committee is not competent to perform the duties imposed on it or undertaken by it by or under this Act or any other enactment for the time being in force and the State Government considers that a general improvement in the administration of the municipality is likely to be secured by the appointment of a servant of the Government as the executive officer of the committee, the State Government may by an order stating the reasons therefor published in the Gazette, appoint such servant as the executive officer of the committee for such period not exceeding eighteen months as may be specified in such order."

It was contended before the Supreme Court that, in making an order under s. 53-A the State Government was re-

(1) A.I.R. 1959 S.C. 107.

quired to act *quasi-judicially* as the statute cast upon it three duties, namely,—

(1) to determine the jurisdictional fact whether the Municipal Committee was not competent to perform the duties imposed upon it;

(2) to come to a decision that a general improvement in the administration of the Municipality was likely to be secured by the appointment of a servant of the Government; and

(3) to state the reasons for its order. The majority of the Judges constituting the Bench in that case came to the conclusion that the State Government was not required to act *quasi-judicially* in spite of the abovementioned three duties cast upon it by the statute. S. R. DAS, C. J. affirmed the views expressed by him in *Advani's* case (1) quoted above and observed:

“The argument is that the first requirement is the finding of fact which may be called a jurisdictional fact, so that the power under s. 53-A can only be exercised when that jurisdictional fact is established to exist. The determination of the existence of that jurisdictional fact, it is contended, is not left to the subjective opinion of the State Government and that although the ultimate act is an administrative one, the State Government must, at the preliminary stage of determining the jurisdictional fact, act judicially and determine it objectively, that is to say, is a *quasi-judicial* way. It is assumed that whenever there has to be a determination of a fact which affects the rights of the parties, the decision must be a *quasi-judicial* decision, so as to be liable to be corrected by a writ of *certiorari*.”

(1) A.I.R. 1950 S.C. 222.

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KAPUR, J., also held that the State Government was not required to act *quasi-judicially* and observed:

"When, under s. 53-A, the State Government appoints an Executive Officer which act it considers likely to improve the general administration of the municipality, it does not take two decisions, one objective as to the incompetency of the administration of the municipality and the other subjective as to the action likely to improve the administration. The decision is only one. The State Government is the sole Judge of both matters, namely, of the incompetency and the remedy needed. Both are parts of one integrated whole, a decision taken in the exercise of the administrative functions of the State Government and admits of no element of judicial process

Besides, the mere requirement of giving reasons would not change what was an administrative body into a judicial body or an administrative decision into a judicial or *quasi-judicial* determination."

If, in *Radeshyam Khare's* case (1) where the statute itself cast a duty upon the State Government to determine a jurisdictional fact and where the decision affected the Municipal Committee, the Supreme Court held that the State Government was not required to act *quasi-judicially*, it cannot be said in the present case where the statute does not cast any duty upon the Vice-Chancellor to determine any particular question of fact that he is required to act *quasi-judicially*.

Learned counsel for the appellant placed reliance upon the decision of LORD REID in *Ridge v. Baldwin* (2) wherein LORD REID has disapproved of the observations of LORD HEWART quoted above and the decision of the

(1) A.I.R. 1959 S.C. 107.

(2) 1964 A.C. 40.

Privy Council in *Nakkuda Ali's* case (1) and has expressed the view that from the very nature of the power conferred upon an administrative body it can be inferred that it is required to act *quasi-judicially* without there being "superadded" a duty to act judicially. In that case, Ridge, who was the Chief Constable of Brighton, was dismissed by the Watch Committee under s. 191(4) of the Municipal Corporations Act, 1882, without being given an opportunity of being heard. This section provided that the Watch Committee may, at any time, suspend and dismiss any Borough constable whom they may think negligent in the discharge of his duty or otherwise unfit for the same. Ridge contended that the Watch Committee was required to act *quasi-judicially* and its order passed without affording him an opportunity of being heard was liable to be quashed by a writ of *certiorari*. Certain regulations framed under the Police Act, 1919, which were held to be applicable, provided a detailed procedure for taking action against Chief Constables for disciplinary offences. LORD REID was of the opinion that the nature of the power exercised under s. 19(14) itself indicated that the Watch Committee was to act *quasi-judicially*. LORD EVERSHERD disagreed on this point with LORD REID. LORD MORRIS of Borth-y-Gest, LORD HODSON and LORD DEVLIN were of the view that the regulations had not been complied with and the dismissal was bad on that account. The decision as a whole is not an authority for the proposition that where no duty to act *quasi-judicially* is cast upon the authority by the statute even then from the very nature of the power conferred the courts can infer that the authority is to act *quasi-judicially*. In any case, I am bound by the decisions of the Supreme Court in the cases of *Khushaldas S. Advani* (2) and *Radhesyam Khare* (3) and by the observations

(1) 1951 A.C. 66.

(2) A.I.R. 1950 S.C. R. 621.

(3) A.I.R. 1959 S.C. 107.

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made in those two cases. GAJENDRAGADKAR, C. J. made a reference to the case of *Ridge v. Baldwin* (1) in *Associated Cement Companies Ltd. v. Sharma* (P. N.) (2) and observed thus:

"In other words, according to LORD REID's judgment, the necessity to follow judicial procedure and observe the principles of natural justice flows from the nature of the decision which the watch committee had been authorised to reach under s. 191(4). It would thus be seen that the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and, consequently, the horizon of the writ jurisdiction has been extended in a corresponding measure. In dealing with questions as to whether any impugned orders could be revised under Art. 226 of the Constitution, the test prescribed by LORD REID in this judgment may afford considerable assistance."

The question before the Supreme Court in that case was whether the State Government, exercising its appellate powers under rr. 6(5) and 6(6) of the Punjab Welfare Officers (Recruitment and Conditions of Service) Rules, was a "tribunal" within the meaning of Art. 136(1) of the Constitution. The Supreme Court held that, when the State Government was hearing the appeal, there was, before it, a *lis* or contest between parties and came to the conclusion that the State Government, exercising powers under rr. 6(5) and 6(6), was a "tribunal" as contemplated by Art. 136. The question, which was have to answer, did not arise before the Supreme Court in that case and the observations of the learned Chief Justice quoted above do not, in my opinion, lay down any new principle or test different from that laid down in *Advani's* case (3) and *Radeshyam Khare's* case (4).

(1) L.R. 1964 S.C. 40.

(3) A.I.R. 1950 S.C. 232.

(2) 1965 (1) Lab. Law. Journal, 433.

(4) A.I.R. 1959 S.C. 107.

In *Calcutta Dock Labour Board v. Jaffar Immam* (1) the Supreme Court again made reference to the decision of LORD REID in *Ridge v. Baldwin* (2). In this case, the question that arose for consideration was whether the Calcutta Dock Labour Board, in exercising its powers to dismiss a dock worker under cl. 36(2) of the Scheme made by the Central Government under the Dock Workers (Regulation of Employment) Act, 1948, was required to observe principles of natural justice or not. It may be mentioned that cl. 36(3) lays down that, before any action is taken under cl. 36(2), the person concerned shall be given an opportunity to show cause why the proposed action should not be taken against him. Cl. 36(2) empowers the Board to take action against a registered dock worker in the reserve pool who is available for work and fails to comply with any of the provisions of the Scheme or does any act of indiscipline or misconduct and enumerates several punishments that may be inflicted. Cls. 38 and 39 provide for appeals against orders of the Board. In this case, the Supreme Court observed:

"There can be no doubt that when the appellant purports to exercise its authority to terminate the employment of its employees such as the respondents in the present case, it is exercising authority and power of a *quasi-judicial* character. In cases where a statutory body or authority is empowered to terminate the employment of its employees, the said authority or body cannot be heard to say that it will exercise powers without due regard to the principles of natural justice. The nature of the character of the proceedings which such a statutory authority or body must adopt in exercising its disciplinary power for the purpose of terminating the employment of its employees, has been recently considered by this Court in several cases, vide *Associated Cement Companies Ltd., Bhupendra Cement Works, Surajpur v.*

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(1) 1962 (2) Lab. Law Journal 112. (2) 1964 A.C. 40.

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P. N. Sharma (1) and *Lala Shri Bhagwan v. Shri Ram Chand* (2) and it has been held that in ascertaining the nature of such proceedings with a view to decide whether the principles of natural justice ought to be followed or not, the tests laid down by LORD REID in *Ridge v. Baldwin* (3) are relevant. In view of these decisions, Sri Sen has not disputed this position and we think, rightly."

This case lays down firstly, that, in taking disciplinary action against a dock worker, the Board has to act *quasi-judicially* and, secondly, that, in determining whether an authority has to follow principles of natural justice, the tests laid down by LORD REID in *Ridge v. Baldwin* (3) are relevant. There can be no doubt that from the nature of the power conferred upon an administrative body it can be inferred that it is required to observe principles of natural justice. LORD HODSON has observed in *Ridge v. Baldwin* (3) that where a statute confers power to take action against a subject for misconduct, the authority exercising the power must observe principles of natural justice otherwise it will result in denial of justice. It is well settled that even where a statutory authority acts in a purely administrative capacity, it must act fairly; and when its action is likely to seriously affect the rights of others, it must observe principles of natural justice. But merely because an authority must observe principles of natural justice, it does not necessarily follow that it has to act *quasi-judicially* also. In this reference, we have not to decide whether the Vice-Chancellor has to observe principles of natural justice or not but whether he is required to act *quasi-judicially*. The decision of the Supreme Court in this case, in my opinion, does not lay down that simply because an authority is empowered to take disciplinary action, it must necessarily act *quasi-judicially*. That an authority, which is empowered to decide some question of fact and whose

(1) (1965) 1 L.L.J. 433.

(3) L.R. 1964 A.C. 40.

(2) Civil Appeal no. 764 of 1964
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decision seriously affects the rights of the subject, is not necessarily required to act *quasi-judicially* also appears from another line of decisions of the Supreme Court. In *Champaklal Chimanlal Shah v. The Union of India* (1), it has been held that the Government may, on a report of bad work or misconduct, hold a preliminary inquiry to satisfy itself that there is reason to dispense with the services of a temporary employee or to revert him to his substantive post. Now, in such cases, the Government has to decide whether the employee is guilty of bad work or misconduct and then to take action against him which may seriously affect him. In this case and other cases, the Supreme Court has held that the Government need not give the employee an opportunity of being heard before an order terminating his service or reverting him is passed. It could not, therefore, possibly be argued that the Government was, in such cases, required to act *quasi-judicially*, even though it had to decide a question of fact and to take action which affected the employee.

Great reliance was placed by the appellant upon the decision of the Supreme Court in *Board of High School and Intermediate Education, U. P., Allahabad v. Ghan-shyam Das Gupta* (2). In this case, the question that arose for consideration before the Supreme Court was whether the Examinations Committee of the Board of High School and Intermediate Education, U. P., was required to act *quasi-judicially* when taking action against an examinee. The U. P. Intermediate Education Act, 1921, made no express provisions as to the powers of the committees and the procedure to be adopted by them in carrying out their duties which were left to be provided by regulations. R. 1(1) of Chap. VI of the Regulations provides:

"It shall be the duty of the Examinations Committee, subject to sanction and control of the Board, (1) to consider cases where examinees have concealed any fact or made a false statement in their

(1) A.I.R. 1964 (2) S.C. 1854.

(2) A.I.R. 1962 S.C. 1110.

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application forms or a breach of rules and regulations to secure undue admission to an examination or used unfair means or committed fraud (including impersonation) at the examination or are guilty of a moral offence or indiscipline and to award penalty which may be one or more of the following:

- (1) Withdrawal of certificate of having passed the examination;
- (2) cancellation of the examination; and
- (3) exclusion from the examination."

The Examinations Committee had cancelled the results of certain examinees and had debarred them from appearing in the Examination of 1955 without affording them any opportunity of being heard. The Supreme Court was of the view that, in exercising its functions under Regulation 1(1), the Examinations Committee was required to act *quasi-judicially* and, since it had taken action against the examinees without affording them an opportunity of being heard, its orders were quashed. WANCHOO, J., who delivered the judgment of the Court, has referred to the case of *Khushaldas S. Advani* (1) and set out the principles enunciated by DAS, J. in that case (already quoted earlier in this judgment) and observed that these principles had been acted upon by the Supreme Court in later cases. Thereafter he observed:

"Now it may be mentioned that the statute is not likely to provide in so many words that the authority passing the order is required to act judicially; that can only be inferred from the express provisions of the statute in the first instance in each case and no one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not. The inference whether the authority acting under a

(1) A.I.R. 1950 S.C. 222.

statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other *indicia* afforded by the statute. A duty to act judicially may arise in widely different circumstances which it will be impossible and indeed inadvisable to attempt to define exhaustively."

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The observations of WANCHOO, J., upon which the appellant relies, are:

"Though therefore there is nothing express one way or the other in the Act or the Regulations casting a duty on the Committee to act judicially, the manner of the disposal, based as it must be on materials placed before it, and the serious effects of the decision of the Committee on the examinee concerned, must lead to the conclusion that a duty is cast on the Committee to act judicially in this matter particularly as it has to decide objectively certain facts which may seriously affect the rights and careers of examinees, before it can take any action, in the exercise of its powers under R. 1(1). We are, therefore, of opinion that the Committee, when it exercises its powers under R. 1(1), is acting *quasi-judicially* and the principles of natural justice which require that the other party (namely the examinee in this case), must be heard, will apply to the proceedings before the Committee."

It is contended by the appellant that the nature of the functions exercised by the Vice-Chancellor, when taking disciplinary proceedings against a student, is identical to those exercised by the Examinations Committee

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taking action against an examinee and, since the Supreme Court has held that the Examinations Committee must act *quasi-judicially*, it must also be held that the Vice-Chancellor must equally act *quasi-judicially*. I am unable to agree with this. WANCHOO, J. has approved of the tests laid down by S. R. DAS, J. in *Advani's* case (1) and he has applied those tests to the facts of the case before him. He has not laid down any new general principle or test different from or inconsistent with that laid down and followed in the earlier decisions of the Supreme Court. This decision cannot be read as laying down a rule of law that, even where the statute or rules made thereunder do not cast a duty upon an authority to act *quasi-judicially*, such a duty can be inferred merely from the nature of the powers conferred upon the authority. In the facts and circumstances of that case the Supreme Court was of the view that the Examination Committee was required to act *quasi-judicially*. The question cannot be decided merely on the basis of similarity of functions of the Examinations Committee and of the Vice-Chancellor but it has to be decided on the basis of the statutes and rules governing the powers of these two authorities. The provisions of the regulations made under the Intermediate Education Act regarding exercise of powers by the Examinations Committee are different from those of the Allahabad University Act and the statutes made thereunder relating to the exercise of powers by the Vice-Chancellor. The regulations casts a duty upon the Examinations Committee to take action against an examinee if it finds that certain facts specified in R. 1(1) are established. The Examination Committee has to determine these facts objectively upon materials placed before it. The nature of the action that may be taken is also specified. On the other hand, the Allahabad University Act and the statutes made thereunder leave the matter of taking disciplinary action against a

(1) A.I.R. 1950 S.C. 222.

student entirely to the discretion of the Vice-Chancellor. He is not required to find whether any specified facts are established or not. Even where certain facts are established, no duty is cast upon the Vice-Chancellor to take disciplinary action. The discretion of the Vice-Chancellor is not fettered even in respect of the nature of the disciplinary action which may be taken. Therefore, the decision of the Supreme Court holding that the Examinations Committee was required to act *quasi-judicially* is not applicable to the present case in view of the very different provisions of the Act and the statutes which govern the exercise of powers by the Vice-Chancellor. The facts that the Vice-Chancellor may take assistance of the Proctor and of the Dean of the Students Welfare in the exercise of his disciplinary authority, and that the Vice-Chancellor is required by the statutes to consult the Dean of the Students Welfare before taking disciplinary action against a student cannot have any bearing on the question whether the power is to be exercised by him *quasi-judicially* or not.

I have accordingly come to the conclusion that the Vice-Chancellor of the Allahabad University is not required to perform any *quasi-judicial* function in inflicting punishments upon students for breach of discipline. I would answer the question referred to the Full Bench in the negative.

BY THE COURT

In view of the majority opinion the question referred to us is answered in the affirmative and it is held that the Vice-Chancellor of the Allahabad University is required to perform *quasi-judicial* functions in inflicting punishments upon students for breach of discipline. It is directed that the costs shall abide the result

Question answered.

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CIVIL REVISION

Before Mr. Justice B. Dayal and Mr. Justice Gangeshwar Prasad.

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Payment of Wages Act, 1936, ss. 15(2)(3) and 17—Order admitting an application under the second proviso to s. 15(2) after prescribed period—Propriety of, can be raised in appeal by the employer against direction under s. 15(3).

From the mere fact that an intermediate order is not itself subject to appeal, it does not follow that there is a finality about it and it enjoys immunity although the ultimate order is appealable. The power to interfere with the former order is inherent in the power to hear appeal.

Held, that the propriety of an order of the Authority admitting an application under the second proviso to s. 15(2) of the Act after the prescribed period of six months can be challenged in an appeal brought by the employer against a direction made under s. 15(3) of the Act.

Case-law discussed.

Prem Narain v. Divisional Traffic Manager (1), dissented from. C. R. No. 603 of 1961—Over-ruled.

Civil Revision No. 422 of 1961 connected with Civil Revision No. 423 of 1961 against the judgment and order of H. G. SHUKLA, Additional District Judge, Allahabad, in Miscellaneous Civil Appeal No. 52 of 1959 decided on 3rd February, 1961.

D. Sanyal, for the Applicant.

The following Judgment of the Court was delivered by—

GANGESHWAR PD., J.:—The following question has been referred to this Division Bench for answer.

“Can the propriety of an order of the Authority under the Payment of Wages Act admitting an
Mathur, J. (1) A.I.R. 1954 Bom. 78.

application under s. 15(2) after the expiry of the prescribed period of six months be raised in an appeal by an employer against a direction under s. 15(3) of the Act."

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The question arose in two connected civil revisions which came up for hearing before MATHUR, J. The learned Judge did not note any conflict in decisions relating directly to the question, but he found a conflict in decisions on a matter having a vital bearing on it, and he thought it necessary that the conflict be resolved. He accordingly directed that the papers be laid before the Hon'ble the Chief Justice for referring the question to a larger Bench. That is how the question has been referred to this Bench.

In his order for reference MATHUR, J. mentioned two cases arising under the Payment of Wages Act: *Prem Narayan Amritlal Verma v. The Divisional Traffic Manager* (1) decided by CHAGLA, C. J. and Civil Revision No. 603 of 1961 of this Court decided by MANCHADA, J. In the former case it was held that the order of the Authority condoning delay in the making of an application under s. 15(2) of the Payment of Wages Act could not be challenged in appeal against a direction made under s. 15(3) of the Act. The latter case dealt with a situation in which the Authority had found that the application made under s. 15(2) of the Act was within time and it was held by MANCHANDA, J. that the application having been found to be within time and in any event the delay in making the application having been condoned the order passed by the Authority in this respect could not be the subject-matter of an appeal or be questioned in an appeal under s. 17 of the Act. The view taken in these cases on the question under reference was, therefore, the same. After mentioning these cases, however, MATHUR, J. proceeded to observe that it

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was settled law that the delay in making an application under s. 15(2) of the Payment of Wages Act could be condoned only on grounds similar to those contemplated by s. 5 of the Limitation Act and that led to consideration of the question whether the condonation of delay under s. 5 of the Limitation Act could be challenged in second appeal against the decree passed in the first appeal, and since there was a conflict in decisions on the aforesaid question and on similar questions arising under other statutory provisions analogous to s. 5 of the Limitation Act the conflict should be resolved. Obviously, the learned Judge was of the opinion that resolution of this conflict was necessary for answering the question under reference. We may, with respect, mention that in *Sheo Prasad v. Additional District Judge, Moradabad* (1) OAK, J. expressed disagreement with the view of CHAGLA, C. J. in *Prem Narayan Amritlal Verma v. The Divisional Traffic Manager* (2) and held that it is open to the appellate authority to enter into the question whether the Claim Commissioner was justified in condoning the delay under s. 15(2) of the Payment of Wages Act. It is evident that this view is also opposed to the view taken by MANCHANDA, J. in the aforesaid civil revision of this Court. There is thus a conflict even in decisions relating directly to the question under reference. It appears that *Sheo Prasad v. Additional District Judge, Moradabad* (1) was not cited before MATHUR, J., even as it was not cited before us.

The relevant provisions of the Payment of Wages Act hereinafter referred to as the Act, are as follows:

"S. 15. (1)

(2) Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been

(1) A.I.R. 1962 All. 144.

(2) A.I.R. 1954 Bom. 78.

delayed, such person himself, or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf, or any Inspector under this Act, or any other person acting with the permission of the authority appointed under sub-s. (1), may apply to such authority for a direction under sub-s. (3):

Provided that every such application shall be presented within six months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made, as the case may be:

Provided further that any application may be admitted after the said period of six months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

(3) When any application under sub-s. (2) is entertained, the authority shall hear the applicant and the employer or other person responsible for the payment of wages under s. 3, or give them an opportunity of being heard, and, after such further inquiry (if any) as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable under this Act, direct the refund to the employed person of the amount deducted, or the payment of the delayed wages together with the payment of such compensation as the authority may think fit, not exceeding ten times the amount deducted in the former case and not exceeding ten rupees in the latter:

* * * * *

17. (1) An appeal against an order dismissing either wholly or in part an application made under sub-s. (2) of s. 15, or against a direction made under

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sub-s. (3) or sub-s. (4) of that section may be preferred, within thirty days of the date on which the order or direction was made, in a Presidency town before the Court of Small Causes and elsewhere before the District Court—

(a) by the employer or other person responsible for the payment of wages under s. 3, if the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees, or

(b) by an employed person or any official of a registered trade union authorised in writing to act on his behalf, if the total amount of wages claimed to have been withheld from the employed person or from the unpaid group to which the employed person belonged exceeds fifty rupees, or

(c) by any person directed to pay a penalty under sub-s. (4) of s. 15 (2) save as provided in sub-s. (1), any order dismissing either wholly or in part an application made under sub-s. (2) of s. 15, or a direction made under sub-s. (3) or sub-s. (4) of that section shall be final."

It is necessary to mention that s. 17 of the Act was amended by the Payment of Wages (Amendment) Act, 1957 and it has been quoted above as it stands after the amendment. The words "An appeal against an order dismissing either wholly or in part an application made under sub-s. (2) of s. 15, or against a direction made under sub-s. (3) or sub-s. (4) of that section" in s. 17(1) as it stands after the amendment were substituted for the words "An appeal against a direction made under sub-s. (3) or sub-s. (4) of s. 15". It would thus be seen that prior to the amendment s. 17 did not provide for an appeal by the employee against an order dismissing

either wholly or in part an application made by him under sub-s. (2) of s. 15, and an appeal lay only against a direction made under sub-s. (3) or (4) of s. 15. As a result of the amendment s. 17 now provides for an appeal by an employee against an order dismissing either wholly or in part an application made by him under sub-s. (2) of s. 15. *Prem Narayan Amritlal Verma v. The Divisional Traffic Manager* (1) was decided before the amendment and Civil Revision No. 603 of 1961 too, although decided after the amendment, dealt with s. 17 as it stood before the amendment. This feature of these two cases does not, however, make any difference so far as the question under consideration is concerned, because the amendment has brought about no change in s. 17 of the Act in regard to an appeal by the employer.

The basis on which these decisions have proceeded is that as s. 17 of the Act provides for an appeal only from a direction made by the Authority under sub-s. (3) or (4) of s. 15 and does not provide for an appeal from an order of condonation of delay passed under sub-s. (2) of s. 15, such an order is not subject to interference in appeal preferred against a direction made under sub-s. (3) of s. 15. The obvious pre-supposition in this reasoning is that if no appeal is maintainable against a particular order passed in a proceeding the correctness of that order cannot be challenged in appeal against the final order in which the proceeding terminates. This pre-supposition, we say with great respect, is not correct.

The appealability of an order passed in the course of a proceeding and the liability of that order to be challenged in appeal from the ultimate order in which that proceeding ends are two distinct things. From the mere fact that the former order is not itself subject to appeal it does not follow that there is a finality about it and it enjoys an immunity from challenge even though the

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latter order is subject to appeal. A person who is adversely affected by the final order in a proceeding against him is entitled in an appeal against the final order to question the correctness of every order which formed a necessary step in the making of the final order, unless he is precluded under the statute from doing so. In this connection we can do no better than quote the observations of the Privy Council in *Maharaja Moheshur Singh v. The Bengal Government* (1):

"We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting forever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities."

We may also refer to the following passage from American Jurisprudence, Volume 5, page 298 (1962 edition):

"In the absence of special statutory form rules or provisions governing appeals from interlocutory orders, the view ordinarily taken is that all interlocutory or intermediate decisions involving the merits of the case and made during the course of the litigation are reviewable on appeal from the final decision if they necessarily affect the final decision."

It is true that the order condoning delay in the making of an application under s. 15(2) of the Act is not

(1) 7 M.I.A. 283.

appealable as such, but that does not lead to the conclusion that a challenge to the correctness of the order is barred on that account. A proceeding under the Act is essentially one that requires simplicity of procedure and expeditious disposal. A provision for an independent appeal from the order condoning delay would have tended to cause delay and multiplicity of proceedings, and in view of the appeal provided against the final order passed under s. 15(3) such a provision was wholly unnecessary. The absence of a provision for an appeal against such an order does not, therefore, indicate that a finality has been conferred upon it. The employer is not affected by such an order unless a direction is eventually made against him under s. 15(3) and since the direction has been made appealable it is open to him to prove the incorrectness of everything that has led to the direction, in the appeal against the direction. Whether a particular interlocutory or intermediate order was or was not proper and whether a discretion vested in the Authority should or should not have been exercised in the circumstances of the case may be matters in which the appellate authority will not ordinarily interfere, but the power to interfere appears to us to be inherent in the power to hear an appeal from a direction issued under s. 15(3).

Further, the nature of an order condoning delay in the filing of an application under s. 15(2) is such that it may be said to constitute the very foundation of the direction which may be made under s. 15(3). It is the condonation of delay in an application filed beyond time that gives to the Authority the power to issue a direction, and the order condoning delay is as such not a mere interlocutory order but an order which is the very basis of the direction and is fundamental to it. The right to appeal against the direction, therefore, necessarily carries with it and has implicit in it the right to challenge the order of condonation of delay. It is no doubt true that

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a right of appeal is not an inherent right attaching to a legal proceeding and it has to be expressly given by statute, but the view that we take of the question before us does not in any manner run counter to the above principle.

The learned counsel for the employee has placed reliance upon the observation of CHAGLA, C. J. that the stage at which the question of limitation can be considered is a stage which is antecedent to the hearing contemplated by s. 15(3) and the question of limitation must be finally disposed of under s. 15(2) before the Authority launches upon the hearing provided for under sub-s. (3). This may be so, but it does not, in our opinion, lead to the result that the condonation of delay is not liable to be questioned in appeal from the direction made under s. 15(3). The question of limitation will certainly be disposed of finally by the Authority so far as the proceeding before it is concerned, but there is no finality attached to the disposal in the sense that it is not liable to be questioned in appeal from a direction made under sub-s. (3). A proceeding started on a belated application may have two stages in its disposal by the Authority but the two stages are nevertheless continuous and in case of condonation the result of the first stage is carried forward and merges in the direction made at the second stage. This division of stages cannot, in our opinion, furnish any basis for holding that the order condoning delay is not subject to question in appeal from the direction although the direction could not have been possible without the condonation. S. 17(2) appears to be very significant in this connection. The legislature has taken care to expressly lay down what acts of the Authority under s. 15 would be final subject to an appeal under s. 17(1). If an absolute finality had been intended to be given to an order condoning delay under s. 15(2) the

legislature would have also laid down that the order condoning delay shall not be called in question in any manner.

It may also be noted that condonation of delay under the second proviso to s. 15(2) has not been described by the Act as an order. We do not mean to say that it is not an order; admission of a belated application under the power conferred by the proviso is an order. What we mean to say is that condonation of delay or admission of an application filed beyond time has not been characterised as an order and this may be suggestive of the fact that the condonation or admission has not been treated as an order which remains separate and dissociated from the direction made under s. 15(3). The direction which may ultimately be made on an application under s. 15(2) of the Act has been made appealable, and that alone is quite sufficient to make every step taken by the Authority at an intermediate stage in the proceeding liable to be questioned in appeal preferred against the direction.

For the reasons discussed above we find ourselves unable to accept the view taken by CHAGLA, C. J. in *Prem Narayan Amritlal Verma v. The Divisional Traffic Manager* (1) and by MANCHANDA, J. in Civil Revision no. 603 of 1961 on the question which has been referred to us. In our opinion the true legal position, if we may say so with respect, was stated by OAK, J. in *Sheo Prasad v. Additional District Judge, Moradabad* (2) where he observed as follows:

"It is true that s. 17 expressly refers to sub-ss. (3) and (4) of s. 15 only. S. 17 makes no reference to sub-s. (2) at all. But I do not see why in dealing with an appeal against an order under sub-s. (3), it should not be open to the appellant to satisfy the appellate court that in the first instance, the Claims Commissioner should not have entertained the claim at all, as it was time-barred.

(1) A.I.R. 1954 Bom. 78.

(2) A.I.R. 1962 All. 144.

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There is nothing in s. 17 to indicate that, in dealing with an appeal under s. 17, the appellate authority has to accept a decision under sub-s. (2) of s. 15 made by a Claims Commissioner as final. The provision in s. 17 is similar to the provision in the C. P. C., for appeals against decrees. According to s. 107, C. P. C. the appellate court has all powers of the trial court. I do not see why that principle should not be applied with equal force to appeals under s. 17 of the Act. In my opinion, although s. 17 makes no reference to sub-s. (2) of s. 15 of the Act, it is open to the District Court to enter into the question whether the Claims Commissioner was justified in condoning the delay under the second proviso to sub-s. (2) of s. 15."

We may now turn to cases dealing with analogous provisions in some other statute. In *Sitaram Ramcharan v. M. N. Nagrashana* (1) their Lordships of the Supreme Court observed that the second proviso to s. 15(2) of the Act 'is in substance similar to the provision in s. 5 of the Limitation Act'. We may, therefore, derive help from cases dealing with the question whether the admission under s. 5 of the Limitation Act of an appeal filed after the period of limitation can be challenged in second appeal from the decree passed in the appeal so admitted. This question was directly the subject-matter of a Full Bench decision in this Court in *Bachi v. Ahsanullah Khan* (2) where it was held that the fact that a subordinate court has decided that a suit or appeal before it was brought within time or that there was sufficient cause, within the meaning of s. 5 of the Limitation Act, for the appellant in that court not presenting the appeal within the period of limitation prescribed, does not preclude the High Court from considering that decision in appeal. We may quote the following observations of MAHMOOD, J. from that decision:

(1) A.I.R. 1960 S.C. 260.

(2) I.L.R. XII All. 461.

"This being so, it seems to me to follow that it is the duty of the second Appellate Court to see whether the duty thus cast upon the Judge of the Lower Appellate Court has been properly discharged by him, and to interfere, if by a wrong, improper and judicially unsound exercise of discretion under s. 5 of the Act, he has admitted an appeal which was barred by limitation. To hold otherwise would be to confer an amount of finality and conclusiveness upon the adjudications of District Judges in this respect which the law could never have intended, for the logical result of such a view would be to paralyse the hands of this Court, even in a case where the Lower Appellate Court by a grossly improper and unsound exercise of discretion under s. 5 of the Act had admitted, and heard, and determined an appeal which had for a century or more been barred by limitation."

We have neither been referred to nor have we ourselves been able to find any case in which a contrary view has been taken since this Full Bench decision was pronounced. This authority is sufficient to dispose of the analogous question whether an order admitting an appeal under s. 5 of the Limitation Act can be challenged in second appeal against the final decree passed in the appeal in which the order was made and it fortifies us in the answer that we propose to give to the question under reference. As instances of cases in which an opinion similar to that expressed in this Full Bench decision we may mention *Chunder Doss v. Boshoon Lall* (1) and *Nrisingha Charan Nandy Choudhury v. Trigunanand Jha Khoware* (2).

In *Hafiz Mohammad Ismail v. Shafaat Husain* (3), a case mentioned by MATHUR, J. in his order for reference, MOOTHAM, J. (as he then was) had before him an

(1) I.L.R. VIII Cal. 251.

(2) A.I.R. 1938 Patna 413.

(3) A.I.R. 1951 All. 614.

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application for revision against a summary dismissal of an application under s. 5 of the Limitation Act and the question raised was whether there was a 'case decided' within the meaning of s. 115, C. P. C. Obviously, therefore, the question was different from the one with which we are at present concerned and none of the decisions referred to in that case bears on the present controversy. Those decisions involved questions relating to ss. 105 and 115 and O. IX of the C. P. C. and an examination of those decisions and an attempt to resolve such conflict as may exist in them would take us very far away from the provisions of the Act in quest of analogies. Further, cases proceeding strictly upon the terms of the C. P. C. and not upon general principles cannot determine the interpretation of the relevant provisions of the Act in view of the fact that the C. P. C. has a very limited application to proceedings under the Act. We, however, think it necessary to say something in regard to an observation made by MOOTHAM, J. After referring to s. 105(1) of the C.P.C. under which an order can be questioned in appeal if it is an order affecting the decision of the case the learned Judge observed: ". . . it appears to me that an order under s. 5, Limitation Act determining as to whether the appellant had sufficient cause for not preferring his appeal within the statutory period has no relation to the merits of the appeal itself". With great respect, we are unable to subscribe to this view. A decision which has the effect of reviving a right or a remedy which, but for that decision, would no longer be enforceable must, in our opinion, be regarded as effecting the merits of the case. In fact the question whether a claim at law is or is not within time is always a question relating to the merits of the claim, because it goes to the very root of it and pertains to the first and the most essential condition of its being;

recognized or entertained. Reference in this connection may be made to the Division Bench case of *Sheikh Mohammad Najibuzzaman v. Sheo Shanker* (1). In that case a written statement by a claimant in proceedings under the U. P. Encumbered Estates Act was presented before the Special Judge beyond the prescribed limit of time. The Special Judge had, however, the power under the provisions of the U. P. Encumbered Estates Act to entertain a written statement presented beyond time if he was satisfied that there was sufficient cause for not presenting it in time, and he accepted the written statement. The question before the Oudh Chief Court in appeal against the decree of the Special Judge was whether the order of the Special Judge accepting the written statement could be questioned. It was held that the order could be questioned and with reference to s. 105, C. P. C. it was observed that 'whether a claim is barred or not is a decision of the case on the merits'. It may be noted that it was also argued in that case that the order entertaining the claim was appealable but had not been appealed against and was, therefore, not liable to be challenged in appeal from the final decree. This decision is in accord with the Full Bench decision in *Bachi v. Ahsanullah Khan* (2).

On a consideration of the relevant provisions of the Payment of Wages Act and the authorities it seems clear to us that the propriety of an order of the authority admitting an application under the second proviso to s. 15(2) of the Payment of Wages Act after the prescribed period of six months can be challenged in an appeal brought by the employer against a direction made under s. 15(3) of the Act. Our answer to the question referred to us is accordingly in the affirmative.

Question answered.

(1) A.I.R. 1943 Oudh 288.

(2) I.L.R. XII All. 461.

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APPELLATE CIVIL

Before Mr. Justice Jagdish Sahai and
Mr. Justice Manchanda

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... OPPOSITE-
APPELLANT,

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PETITIONER-RESPONDENT

VED PRAKASH TYAGI AND OTHERS

PRO FORMA-
RESPONDENTS.

Constitution of India, 1950, Art. 226—Power of High Court—If restricted by Acts of Parliament or State Legislature—Right to get elected—Nature—Remedy of an election petition under U. P. Town Area Committees Act—If limits the power under Art. 226, Constitution—Cases where a person is declared elected and his election is challenged and where the election result has not been clearly declared—Distinction—Remedy—Office, when can be said to be full—U. P. Town Areas Act II of 1914, s. 6-J(2) and 17 under it.

It is well settled that the powers of the High Court under Art. 226 of the Constitution cannot be restricted by a provision contained in an Act of Parliament or of State Legislature. Consequently, even though as a practice and in order to respect legislative direction that an election shall not be challenged except by means of an election petition there is no insurmountable hurdle in the way of the High Court in granting relief in a suitable and hard case.

Besides, there is a difference between a case where a person has been declared elected and his election is challenged and where the result of the election has not been clearly declared. In the former case the remedy is by election petition, in the latter case it will be by a writ of *mandamus*, directing the Returning Officer to declare the result clearly and in proper manner. Where Form 17 is highly equivocal and contradictory it cannot be said that the result was clearly declared and that being so remedy under sub-s. (2) of s. 6-J could not be availed of by either party.

Where a candidate declared elected did not participate in any of the meetings of the Committee, nor assert his right, it could not be said that the office was full.

Special Appeal no. 303 of 1966 against the order and judgment of G. C. MATHUR, J. in Civil Miscellaneous Writ no. 670 of 1966 decided on 28th April, 1966.

K. C. Agarwal, for the Appellant.

M. S. Negi, for the Respondent.

The following judgment of the Court was delivered by—

JAGDISH SAHAI, J.:—This Special Appeal is directed against the judgment of G. C. MATHUR, J., dated 28th April, 1966, allowing writ petition no. 670 of 1966 filed by respondent no. 1 Chetu. The last election of the Chairman and members of the Town Area Committee, Newari, district Meerut, was held on 29th of November, 1964.

The dispute in the present case relates to Ward no. 5 which is a double member Constituency in which one seat is reserved for the Scheduled Caste and the other is a general seat. There were four contestants in this Ward, i.e. the appellant Hira and respondent no. 1 Chetu, both of Scheduled Caste and Dayanand and Maujuddin for the general seat.

Admittedly in all 585 votes were polled. Of these at the time of counting 35 were declared invalid and the result was declared on the basis of the remaining 550 valid votes on 30th November, 1964. Annexure 'G' is Form no. 15 prepared by the Returning Officer on the 30th November, 1964. In this document the votes received by the various candidates have been stated as follows :

			Votes
1. Chetu	262
2. Sri Dayanand	283
3. Sri Maujuddin	278
4. Sri Hira	334

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The same day Annexure 'H' which is Form no. 17 was prepared. In this the votes polled by each of the contestants have been shown as follows:

			Votes
1. Sri Chetu	...	...	262
2. Dayanand	...	...	283
3. Maujuddin	...	...	278
4. Hira	...	...	234

In the *Uttar Pradesh Gazette Extraordinary*, dated December 7, 1964, the following notification, dated November 30, 1964, was published under the signature of the Assistant Returning Officer :

"In pursuance of the provisions of para 68 of the U. P. Town Areas (Conduct of Election of Members) Order, 1964, I hereby declare that Sri Heera of Newari, has been elected to the seat reserved for members of the Scheduled Castes in Ward no. 5 of Newari Town Area and Sri Daya Nand of Newari, has been duly elected to fill the remaining seat in that Ward."

In the same issue of the *Uttar Pradesh Gazette* there is another notification no. LB-7680/XVII-A—109-LB-1964, which so far as is relevant for the purpose of the case reads:

"With reference to notification nos. LB-677/XVII-A—109-LB-1964 and LB-7688/XVII-A—109-LB-1964, dated December 7, 1964 and in pursuance of the provisions of para 81 of the U. P. Town Areas (Conduct of Election of Members) Order, 1964, the Governor is pleased to notify that the Committee

of each of the Town Areas named below, has been constituted:

<i>Serial no.</i>	<i>Name of district</i>	<i>Name of Town Area</i>
1.
2.
3.
4.
5.	Meerut	Niwari and Phalauda

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The first meeting of the Town Area Committee after the election, dated 29th November, 1964 was held on 7th of December, 1964. For this, notice was sent to respondent no. 1 Sri Chetu and not to the appellant Hira and it was the former who participated in the meeting. Thereafter in every meeting in the Town Area Committee up to December, 1965 not Hira appellant but Chetu respondent no. 1 participated.

On 9th of December, 1965, Chetu along with five others handed over to the District Magistrate, Meerut, a notice for convening a meeting of the Town Area Committee, Newari in order to consider the motion of non-confidence of the Chairman of the aforesaid Town Area Committee (hereinafter referred to as the Committee) Sri Ved Prakash Tyagi. The District Magistrate issued a notice on 29th December, 1965 convening a meeting of the Committee for 10th January, 1966. For this meeting notice was issued to Hira appellant and not to respondent no. 1 Chetu.

It is admitted that on 7th of December, 1964 when Chetu for the first time participated in the meeting of the Committee he took oath of office as required by the Rules, before the Naib-Tahsildar, Ghaziabad, who was deputed for that purpose by the Sub-Divisional Magistrate, Ghaziabad.

On 1st January, 1966 the petitioner met the District Magistrate and brought to his notice the fact that he

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and not Hira appellant had been elected to the Town Area Committee from Ward no. 5. The District Magistrate, however, directed Chetu to make a written application which he did on January 3, 1966. It does not appear if any action was taken on this application and on the meeting of 10th January, 1966. Chetu who wanted to sit in the meeting was not permitted to do so by the City Munsif who was presiding over that meeting, under the instructions of the District Magistrate. It is admitted that Hira made no attempt to join this meeting. The motion of non-confidence was put to vote by the City Munsif and five persons voted for it. Since these five did not constitute the requisite majority, the motion was declared to have been lost.

Aggrieved by the action of the authorities in not permitting Chetu to participate in the meeting held on 10th January, 1966 and apprehending that he would be obstructed in the discharge of his duties as a member, he filed the writ petition giving rise to this Special Appeal, on 23rd of February, 1966. G. C. MATHUR, J. allowed the writ petition on the ground that he was satisfied that the Returning Officer had not performed his duty in accordance with law. The learned Judge observed as follows:

Both Form no. 15 and Form no. 17 contain manifest errors. The recording of votes received by each candidate in Form no. 15 is patently wrong. Further, the declaration in favour of respondent no. 7 in Form no. 17 is not in accordance with the votes recorded in favour of each candidate in this form. If the votes recorded in Form no. 17 are correct, then the petitioner should have been declared elected and not Hira. The fact that the petitioner was administered the oath of office and functioned as a member of the Committee for over

a year without any protest from respondent no. 7 supports the case of the petitioner that, in fact, he, and not Hira, was elected. This situation has arisen on account of the fact that there appears to be no provision for intimation of the results of elections to the Town Area Committee either by the Returning Officer or by the District Magistrate. ". . . . Every one, including respondent no. 7, appears to have thought that the petitioner had been duly elected as a member of the Committee and he took the oath and functioned as a member for over a year. If, in these circumstances, the petitioner did not file an election petition within the time prescribed therefore, he is not much to blame for it".

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The learned Single Judge did not grant Chetu the relief of a writ of *quo warranto* by stating as follows:

"A writ of *quo warranto* can only be issued against respondent no. 7 (Hira) if it is found that his election was illegal in spite of the fact that he was declared to be duly elected. The petitioner's case is that he actually received a majority of the valid votes and that the declaration in favour of Hira was wrong and illegal. Learned counsel for the petitioner wants that the ballot-papers be counted here to find out whether the petitioner or Hira has received a majority of valid votes. I do not conceive that to be the function of this Court in proceedings under Art. 226 of the Constitution. A writ of *quo warranto* would normally be issued against a person declared by the Returning Officer to have been duly elected only if the illegality of his election is patent as in the case of a disqualification. But, where the illegality has to be found by a re-counting of the ballot-papers or by the determination of some facts,

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such as the commission of a corrupt practice, a petition for a writ of *quo warranto* would not be entertained. The appropriate remedy in such cases would be an election petition."

The relief granted by the learned Single Judge is in the following words:

"I accordingly allow this writ petition, quash the declaration of the result by the Returning Officer and its publication in the official *Gazette* and direct that the Returning Officer shall, after taking the necessary steps, re-declare the result. If he considers it necessary, he may again count the ballot-papers and the votes received by the candidates and prepares Form no. 15 also afresh. Since the result of this order will be that respondent no. 7 (Hira) will not be able to function as a member of the Committee and the petitioner will also not be able to function as a member as there is no declaration in his favour, it is desirable that the Returning Officer should make a fresh declaration expeditiously."

We have heard Sri S. C. *Khare* for the appellant Hira and Sri S. N. *Kacker* for respondent no. 1 Chetu at some length.

Mr. *Khare* has made the following submissions before us:

(1) That the right to get elected as a member of the Town Area Committee is not a common law right but is one conferred by the U. P. Town Areas Act and inasmuch as that Act provides the remedy by an election petition which Chetu admittedly did not file, this Court should not have interfered in the exercise of its jurisdiction.

(2) That inasmuch as Hira appellant has been declared elected, the office is full and under these

circumstances a writ of *mandamus* which in effect the learned Single Judge has issued should not and could not have been issued.

(3) That inasmuch as in Form no. 17 Hira appellant had been declared elected and no election petition was filed, he is invested with a right to sit as a member of the Town Area Committee, Newari and he cannot now be deprived of that right.

(4) That the writ petition was a belated one and was also not *bona fide*. The learned Single Judge had not exercised his discretion rightly in entertaining the writ petition.

No other submission has been made before us.

All the submissions made by Mr. *Khare* are inter-linked and we can take them altogether.

It is true that the right to get elected as a member of the Town Area Committee is not a common law right and is one conferred by statute and that inasmuch as the statute provides the remedy of an election petition under s. 6-I of the Act, the normal rule is that the remedy of a person aggrieved is confined only to an election petition. S. 6-I reads :

"Jurisdiction of Civil Courts:—(1) No Civil Court shall have jurisdiction—

(a) to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll of a Ward ; or

(b) to question the legality of any action taken by or under the authority of an Electoral Registration Officer or of any decision given by any authority appointed under this Act, for the revision of any such roll : or

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(c) to question the legality of any action taken or any decision given by the Returning Officer or by any other Officer appointed under this Act in connection with an election.

(2) No election (of a member) shall be called in question except by an election petition presented in accordance with the provisions of this Act."

The provisions of this section are mandatory and clearly preclude the jurisdiction of a Civil Court in respect of a matter which can be decided in an election petition. Admittedly the election of a person cannot be challenged except by means of an election petition. The question therefore that requires consideration is whether Sri Hira has been elected at all. It is true that in Form no. 17 he has been declared elected. It is also true that in the *Uttar Pradesh Gazette*, dated the 7th December, 1964, there is a notification declaring Hira elected. It is, however, clear that the Form no. 17 is equivocal and also self-contradictory. The number of votes shown to have been polled by Hira in that Form are 234 as against 262 polled by Chetu. The notification in the *State Gazette*, dated 7th December, 1964 is issued under the signatures of the Assistant Returning Officer and is based upon the concluding portions of Form no. 17. It is well settled that in order to find out what exactly has been said in a document, the whole document must be read. We have already pointed out that the recitals in Form no. 17 are self-contradictory and if one confines himself to one part of it, it is clear that Chetu and not Hira was elected; on the other hand if one looks to the other part of it, it appears that Hira and not Chetu was declared elected. It is unfortunate that the Assistant Returning Officer did not perform his duty vigilantly and allowed a mistake to creep in.

All parties concerned i.e. the Chairman of the Committee, Hira and Chetu took it that Chetu and not Hira had been declared elected. As pointed out earlier for a year Chetu attended every meeting of the Committee to the exclusion of Hira. The admitted factual position is that at least till the date of the filing of the writ petition Hira did not participate in the meeting or take the oath of the office. The Act does not provide the grounds on which an election petition can be filed; but r. 48 of the Election Rules provide for the grounds on which an election petition can be filed. That provision reads :

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"The election of any person as Chairman or member of the Committee may be questioned on any of the following grounds—

(a) that such person was declared to be elected by reason of the improper rejection or admission of one or more votes, or for any other reason was not duly elected by a majority of lawful votes ;

(b) that such person committed corrupt practice as defined in r. 49 below for the purpose of the election ;

(c) that such person was not qualified to be nominated as a candidate for election or that the nomination paper of a petitioner was improperly rejected.

This Rule would also show as sub-s. (2) of s. 6-I of the Act does that what can be challenged by means of an election petition is the election of any person as a member.

If there has been no election of a person the occasion to file an election petition against him does not arise. In the present case as already pointed out earlier even Hira did not claim that he was elected and Chetu

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not only took the oath of the office in the first meeting of the Committee but continued to participate in the subsequent meeting for a year. It is true that in Form no. 17 there is a line to show that Hira had been declared elected but as already pointed out earlier, Form no. 17 is highly equivocal and a part of it shows that not Hira but Chetu had been declared elected. At no time upto 9th of December, 1965 Chetu was obstructed in the discharge of his duties as a member of the Town Area Committee. He had therefore, no occasion or cause of action to file an election petition.

But assuming that he could have filed an election petition, the question that requires consideration is whether this Court is precluded from entertaining this petition in the unusual and extraordinary circumstances of the case. It is well settled that the powers of this Court conferred by means of Art. 226 cannot be restricted by a provision contained in an Act of Parliament or of State Legislature. Consequently, even though as a practice and in order to respect the Legislative direction that the election shall not be challenged except by means of an election petition, there is no insurmountable hurdle in the way of this Court in granting relief in a suitable and hard case. The Act has been passed by the U. P. Legislature and s. 6-I obviously cannot be read as a restriction on the powers of this Court under Art. 226 of the Constitution of India.

We are unable to agree with the extreme argument advanced by Mr. Khare that the right to the office of member of a Town Area Committee is itself limited. Mr. Khare contended that there is another way of looking into the matter. He submitted that the right a member of the Town Area Committee has, in respect of his office, has a limitation attached to it, the same being that the office is taken subject to the condition that even though a person is wrongfully deprived of it

he has no remedy except as provided by s. 6-I of the Act and if it is not covered by that provision he has no remedy at all. In our judgment these extreme arguments are based upon a misconception of the right of a member. It is true that the right to be elected a member flows from the statute and is not a common law right. But there is a difference between the right and the remedy for asserting that right. If a person who is member of a Committee is stopped by some others from attending the meeting of the Committee, he would surely be entitled to bring a suit in a civil court for an injunction restraining those persons from interfering with his right as a member of the Committee.

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There is a difference between a case where a person has been declared elected and his election is challenged and a case where the result of the election has not been clearly declared. In the former case the remedy is by way of an election petition, in the latter case it will be by a writ of *mandamus* directing the Returning Officer to declare the result clearly and in a proper manner. In the present case what we have to see is; whether the petitioner was or was not elected? We have already said earlier that Form no. 17 is highly equivocal whereas a part of it declares Chetu to be elected the other part declares Hira to be elected. Under these circumstances it is not a case where it can be said that either Hira or Chetu had been clearly declared elected. That being the position the remedy provided by sub-s. (2) of s. 6-I of the Act could not be availed of by either of them. We, therefore, reject this submission of Mr. Khare.

We are satisfied that there was no delay on the part of the petitioner. He came to this Court within a month and a half from 10th of January, 1966, when for the first time his right as a member of the Town

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Area Committee was challenged. We can see no *mala fide* also on the part of Chetu. He has a genuine and real grievance. Whereas he was performing the functions of his office unhampered for over a year he was suddenly stopped from doing so by Hira. We, therefore, reject the submission of Sri Khare that the petition giving rise to this appeal was belated or was not *bona fide*.

It is true that when an office is full a writ of *mandamus* does not issue. [See *Sohan Lal v. Union of India* (1)] and Halsbury's Laws of England, Simonds Edition, Vol. II, para 165] [See also *R. v. Chester Corporation*, (2)]. In the present case, however, the question is whether the office is really full? We have already stated earlier that Hira did not participate in any of the meetings of the Committee at least till the end of December, 1965. He did not even assert his right as a member and did not claim to be one until the motion of no-confidence against Sri Tyagi the Chairman was tabled. We are, therefore, of the opinion that the office is not full. That being the position, there is no bar to a writ of *mandamus* being issued in the present case.

Mr. Kacker also prayed that a writ of *quo warranto* may now be issued. We are unable to do so for the simple reason that we have come to the conclusion that Hira is not really occupying the office as a member of the Town Area Committee of Niwari.

The Assistant Returning Officer was performing an official and statutory duty while counting the votes and declaring the result of the election. That he has done his duty in a most careless manner, cannot be doubted. It is also clear that there has been no unequivocal declaration of the result of the Scheduled Caste seat in Ward no. 5.

(1) (1957) S.C. page 529.

(2) (1855) 25 L.J.Q.B. 61-E.

It is true that the Committee has been already constituted and the pre-constitution stage i.e. the election stage is completely over now for about two years. But in the peculiar circumstances of the case and in view of the circumstances that there has been no clear and proper declaration with regard to the Scheduled Caste seat in Ward no. 5, we have no alternative but to insist that the Returning Officer or the Assistant Returning Officer did actually perform the duty cast upon them.

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It has been contended that the Returning Officer or the Assistant Returning Officer have become *functus officio* and that neither of them were Tribunals within the meaning of Art. 227 of the Constitution of India; with the result that there is no power with this Court to direct the Returning Officer or the Assistant Returning Officer to re-declare the result after re-counting the votes and by preparing a proper Form no. 17. Mr. Khare has distinguished the case of *Hari Vishnu Kamath v. Ahmad Ishaque* (1) on the ground that that was the case of a Tribunal which could be re-constituted, in the instant case there is no Tribunal and for that reason Art. 227 is not available.

The powers given to this Court under Art. 226 of the Constitution are not confined to the issuing of prerogative writs alone.

Looking in a wide perspective it is not only a dispute between Chetu and Hira. It is really a case where the Town Area Committee, Newari is not fully constituted because it is not known with exactitude as to who is the Scheduled Caste representative from Ward no. 5 in that Committee. In these circumstances not only the rights of the parties but the larger interest of the public of Newari require that this Court should intervene. That being the position, we are of the opinion that the

(1) A.I.R. 1955 S.C. 293.

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order passed by G. C. MATHUR, J. is legally correct and imminently just. We, therefore, dismiss this special appeal and affirm the judgment of G. C. MATHUR, J., dated the 28th of April, 1966. The parties shall, however, bear their own costs. The interim order, dated 17th May, 1966 is vacated and the Returning Officer may declare the result in Form no. 17 as directed by this Court.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Jagdish Sahai and Mr. Justice
Manchanda

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... APPELLANT,

v.

MESSRS. SHAMBHOO DAYAL OM PRAKASH

& CO. AND OTHERS

... RESPONDENTS.

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India Evidence Act, 1872, ss. 17, 31 and 115—Admission—Admission on a point of law—If binding—Paragraph in an affidavit setting out facts and legal consequences therefrom admitted by the other side—If would operate as an estoppel on the point of legal consequences.

It is well settled that "admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel within the meaning of s. 115, Indian Evidence Act". Admissions are not conclusive unless they operate as an estoppel. A party can never be held bound by an admission on a point of law and it is open to him to explain that it was erroneous and by inadvertance.

Held, that admission of a paragraph of an affidavit containing a point of law did not operate as an estoppel.

Jagwant Singh v. Silam Singh (1) and *Jottendra Mohun Tagore v. Gonendra Mohan Tagore* (2) followed.

Nand Kishore Rai v. B. Ganesh Prasad Rai (3) disapproved.

Special Appeal no. 185 of 1962 against the judgment and Order of BRIJLAL GUPTA, J. in Civil Miscellaneous Writ no. 654 of 1958, decided on 3rd November, 1961.

Gopal Behari, for the Appellant.

The following judgment of the Court was delivered by—

MANCHANDA, J.:—This is a special appeal directed against the judgment of BRIJLAL GUPTA, J., dated the 3rd November, 1961 where by the writ petition filed by the

(1) (1899) I.L.R. 21 All. 285 at 287. (2) (1872) L.R. Supp. I.A. 47.

(3) A.I.R. 1929 All. 446 and 447.

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respondent was partly allowed and a writ of *certiorari* was issued quashing the orders imposing penalty under s. 46(1) of the Income Tax Act, 1922 (hereinafter referred to as the Act) in the sums of Rs.533 and Rs.450 and a writ of *mandamus* restraining the Income-tax Officer from realising the said amounts.

The sole ground on which the orders levying penalties in the sum of Rs.533 and Rs.250 were quashed was because of an admission said to have been made by the Income-tax Officer in his counter-affidavit, "that the contents of para 14 of the said affidavit are admitted". Para 14 of the affidavit was as follows:

"That on the 28th November, 1957 the Income-tax Officer, Firozabad imposed a further penalty of Rs.533 on petitioner no. 1 under s. 46(1) of the Income Tax Act. The Income Tax Officer acted without jurisdiction in imposing this penalty as he had already once imposed a penalty on 2nd March, 1957 for default and had forwarded recovery certificate to the Collector on 7th March, 1957 under s. 46(2) of the Income Tax Act."

The learned Single Judge observed "that" on this admission alone the petitioners are entitled to a relief in respect of Rs.533. The contention of the learned Standing Counsel for the Department that the admission on facts alone can be binding and not on law was rejected for the reason that the admission made in the counter-affidavit was an unqualified one. In this view of the matter, the learned Single Judge did not consider the two grounds on which the petitioner had sought to challenge the levy of penalties.

In these circumstances, the only question which falls for consideration is, whether the learned Single Judge was justified in treating the said admission of the Income-tax Officer as binding and conclusive?

The said para 14 of the affidavit sets out some facts and then draws a legal inference of law therefrom. It is stated that penalty was levied on the 2nd March, 1957 for default which was after the recovery certificate had been forwarded to the Collector on the 27th March, 1957 under s. 46(2) of the Act. From this the conclusion of law according to the deponent was that the Income-tax Officer had acted without jurisdiction in imposing a penalty. In the counter-affidavit, when it was stated that para 14 is admitted, that could only mean that the facts stated therein are admitted but not the legal inference which according to the petitioner, flowed from those facts.

To begin with, the petitioner had no business in an affidavit to set out any legal contentions. The Rules of Court require that an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory applications. A legal contention cannot be something which the deponent can prove from personal knowledge and yet the whole of the said para 14 of the affidavit of the petitioner was sworn as "true to my personal knowledge". The learned Single Judge, therefore, fell into an error in holding that the Income-tax Officer was bound by the admission made by him. The view taken by the learned Single Judge in holding the appellant bound hand and foot by his admission on a question of law can perhaps only be justified on the ground that a Single Judge is ordinarily bound to follow the decision of another Single Judge and though there is no mention of the earlier case in *Nand Kishore Rai v. B. Ganesh Prasad Rai* (1) decided by DALAL, J. It would seem that he had it at the back of his mind. There, it was laid down that an admission by a party's counsel of facts or law, is binding and cannot be reopened. In that case the counsel of the party had before the subordinate court

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made a statement that 'if the eves be found to project over the *rasta* land then there can be no question that the projecting portion is liable to removal'. The subordinate court having acted thereupon, DALAL, J. felt that "it would be doing great injustice to a subordinate court of law to reopen a matter here which has been decided by that court on the admission of a pleader of a party". With all respect this decision does not lay down the law correctly and in any event must be confined to the facts of that case. It is well settled in India, whatever may be the position in England, that "an admission on a point of law" is not an admission of a "thing" so as to make the admission a matter of estoppel within the meaning of s. 115 of the Evidence Act" [*Jagwant Singh v. Silam Singh* (1)]. It is again well settled that a party cannot be held bound by an admission on a point of law. It is always open to a party to assert that the admission on a point of law was erroneously or inadvertently made and "that upon a true construction of the law he may appear to be entitled [*Jottendro Mohun Tagore v. Gonendro Mohan Tagore* (2)].

In any event it is always open to a party to explain that the admission on a question of law was incorrect. Ss. 17 and 31 of the Evidence Act make it clear that admissions relate to facts and that such admissions are not conclusive unless they operate as estoppel. The admission in the relevant case, contained in the counter-affidavit of the appellant to the statement made in para 14 of the affidavit of the respondent, even if it could have been taken to be admission on a point of law, it would certainly not have operated as estoppel.

For the reasons given above the order of the learned Single Judge cannot be sustained and it is directed to

(1) I.L.R. (1899) 21 All. 285, 287. (2) (1872) L.R. Supp. I.A. 47.

be set aside. The petition will now go back to a learned Single Judge for determining the two-old questions formulated but left undecided and for disposing of the petition in accordance with law.

The appeal is allowed but as due care was not observed by the appellant in replying to the statements made in the affidavit of the respondent and as the appeal has not been opposed there will be no order as to costs.

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Appeal allowed.

CRIMINAL MISCELLANEOUS

Before Mr. Justice Takru

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ADVOCATE

... PETITIONER,

v.

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Contempt of Court—Compromise between parties—‘Undertaking by one party accepted by another—Undertaking if given to the court—Court recording it and passing decree on its basis—Meaning of the word ‘Undertaking’—Breach of—Liability for contempt.

Where in a case the parties compromised which was recorded by the court as follows: “The learned counsel for the respondent has agreed not to execute the decree for a period of five months if the appellant undertook to vacate the premises within that period. The appellant has given an undertaking to that effect” and the appeal was dismissed with costs on its basis, it was;

Held, that the undertaking was not given to the court and therefore its non-compliance cannot be contempt.

Held, further, that the word ‘undertaking’ has to be construed in its ordinary meaning.

Nisha Kanto Roy Chowdhury v. Smt. Saroj Bashini Goho (1) followed.

Rajranglal Gangadhar Khemka v. Kapurchand Ltd. (2) distinguished.

Criminal Miscellaneous Contempt Application no. 29 of 1966.

S. N. Kacker, S. K. Suri and H. S. Joshi, for the Applicant.

S. P. Gupta, for the Opposite-party.

TAKRU, J.:—This is a petition by Amar Chand Kapoor praying that proceedings for contempt of Court be taken against the opposite-parties.

(1) A.I.R. 1948 Cal. 294.

(2) A.I.R. 1950 Bom. 236.

The facts of the case in so far as they are material for its decision, are not in dispute and stated briefly are as follows:

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The opposite-parties filed a second appeal in this Court against the judgment and decree of the lower appellate court ordering their ejection from a house in Moradabad and awarding compensation and mesne profits to the petitioner. After conclusion of the arguments in this Court, the parties arrived at an agreement which was incorporated in the judgment of this Court dated the 1st November, 1965, as follows:

"The learned counsel for the respondent has agreed not to execute the decree for a period of five months if the appellant undertook to vacate the premises within that period. The appellant has given an undertaking to that effect.

In the result, the appeal fails and is hereby dismissed with costs. The appellant, however, will not be evicted for a period of five months from today in view of the above undertaking."

For some reason or the other, the opposite-parties did not keep their promise, and thereupon the petitioner filed the present petition on the 10th May, 1966 for the relief stated above. On the petition coming up for hearing on the 16th May, 1966 notice was issued to opposite-party no. 1 only and in response to it, he appeared on the 18th July, 1966 and took time for filing a counter-affidavit. On the 24th July, 1966, however, the parties entered into a compromise whereby the petitioner gave the opposite-parties time up to the 31st July, 1966 for vacating the premises in return for the opposite-parties agreeing to vacate the premises and paying the entire amount due from them by that date. It is admitted that both the undertakings were complied with by opposite-party no. 1 on the 31st July, 1966.

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On behalf of the petitioner it was contended that as opposite-parties did not abide by the undertaking given by them to this Court on the 1st of November, 1965, they must be held guilty of committing contempt of Court. On behalf of the opposite-party no. 1 it was however urged that as the undertaking in question was not given to the Court but was merely in the nature of a promise, opposite-party no. 1 cannot be held to have wilfully disobeyed any undertaking given by him to this Court, so as to render him liable for contempt of Court. Thus from the rival contentions set out above it is clear that the decision of this case turns upon the interpretation which is to be placed on the aforesaid order it being undisputed that if it contains an undertaking to the Court then its wilful default would constitute contempt of this Court.

Now a plain reading of the first paragraph of this order shows that it consists of two parts—the first part containing the offer which the petitioner made to opposite-party no. 1 and the second part containing its acceptance by the latter. The offer and acceptance are purely *inter-partes* and it is not possible to find anything express or implied in the said order amounting to an undertaking given by opposite-party no. 1 to the Court. As a matter of fact the words 'has agreed not to execute the decree for a period of five months' show that the only consequence which the contracting parties had in mind in case opposite-party no. 1 did not perform his part of the agreement within the stipulated period, was that the petitioner would be free to execute his decree. Reference in this connection may be made to the decision in *Nisha Kanta Roy Chowdhury v. Smt. Saroj Bashini Goho* (1) which is very similar on facts to the present case. In this case the owner of certain premises brought a suit for ejectment

(1) A.I.R. 1948 Cal. 294.

against the lessee on the ground that the latter had installed certain image on the premises without the former's consent. The suit was compromised. The material paragraph of this compromise stated:

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"The defendant hereby undertakes to remove the said Kali image as also all permanent brick built and other structures in and around the place where the image of Kali is situate before he gives up possession of the said shop room or at any time prior thereto on demand by the plaintiff or the owner for the time being of the said premises No. 1-A Abhoy Goho Road."

The compromise was presented to the Court and a decree was passed in terms thereof. The lessee, however, subsequently declined to remove the image on demand by the owner, whereupon the latter applied to commit the lessee for contempt of Court on the ground that he had broken an undertaking given to the Court. The application was heard by a learned Single Judge and he came to the conclusion that the lessee had given an undertaking to the Court to remove the Kali image, etc. upon demand made by the owner and as he had declined or neglected to do so after such demand he was guilty of a breach of his undertaking to the Court. On appeal by the lessee a Division Bench of that Court held that on a true construction of the compromise the mere use of the word 'undertake' did not mean a promise to the Court. It was simply a solemn promise by the lessee to the owner and the nature of that promise or undertaking could never be changed by reason of the compromise being accepted by the Court and a decree passed in its terms. Hence the lessee could not be convicted for contempt of Court. The aforesaid decision therefore fully supports the view taken by me above.

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On behalf of the petitioner *Bajranglal Gangadhar Khemka v. Kapurchand Ltd.* (1) was cited. In this case it was held that :

"Although the Court may be bound to record a compromise still when it passes a decree, it puts its imprimature upon those terms and makes the terms a rule of the Court and it would be open to the Court to accept an undertaking given by a party to the Court. Therefore there is nothing contrary to any provision of the law whereby an undertaking cannot be given by a party to the Court in the consent decree which undertaking can be enforced by proper committal proceedings."

No doubt this case supports the petitioner's contention but as the word 'undertaking' used in it was construed as an undertaking to the Court on account of the fact that through long practice that word had come to acquire a technical meaning as distinguished from its dictionary meaning in the Bombay High Court the said decision loses all force so far as the present case is concerned. This distinction became more significant when we see that earlier in this decision it was observed thus :

"It is perfectly true that if the word 'undertake' bore its plain and natural meaning then there would be no justification for construing that expression to mean that the undertaking was given to the Court. The clause does not state to whom the undertaking is given and it may be that it would be possible to hold that as the parties were settling the dispute between themselves the undertaking as given by one party to the other. . . ." But in our opinion the expression 'undertake' has come to acquire through long practice a technical meaning and that undertaking is always understood to be an undertaking to the Court

(1) A.I.R. 1950 B. 336.

which could be enforced by the committal proceedings."

I have quoted at length from this judgment as it is my endeavour to show that the construction put upon the word 'undertaking' by the Bombay High Court is based not upon its plain and natural meaning but upon the technical meaning which it has come to acquire in that Court over a number of years. No such technical meaning has been acquired by that word in this Court. It is therefore clear that the Bombay decision must be held confined to cases arising in that Court and has no application to the present case. I am therefore satisfied that the order relied upon by the petitioner only contains a 'solemn promise' to vacate the premises in question within five months and does not contain any undertaking by him to that effect to the Court. The result, therefore, is that this petition fails and is dismissed and the notice issued to opposite-party no. 1 is discharged, but in all the circumstances of the case I make no order as to costs.

Petition dismissed.

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APPELLATE CIVIL

Before Mr. Justice Verma and Mr. Justice Rajeshwari
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APPELLANT

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v.

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RESPONDENTS

Indian Railways Act, IX of 1890, s. 77—Delivery taken by wrong person on forged receipt and pledged with another—Right of the Railway to file suit for recovery of goods—Bona fides of the pledgee—If affects the right of the Railway.

The position of the Railway as public carrier is that of a bailee. A bailee is competent to file a suit for recovery of the goods fraudulently or forcibly taken out of his possession by persons without title. Where after the wrongful deprivation of possession of the bailee, the goods are pledged, the fact that the pledgee acted in good faith and paid consideration cannot defeat the right of the bailee to recover the goods.

The dictum, "wherever of the two innocent persons must suffer by the acts of the third, he who has enabled such third person to occasion the loss must sustain it", *held* did not apply as on the circumstances of the case the negligence of the railway was not the proximate result of the pledgee accepting to advance money.

First Appeal No. 596 of 1956 from the Judgment and decree of Moti Babu, 1st Addl. Civil Judge, Kanpur, in Suit No. 187 of 1953 decided on 3rd August, 1956.

J. Swarup, for the Appellant.

T. N. Sapru and *B. N. Misra*, for the Respondents.

The following judgment of the court was delivered by—

R. PRASAD, J.:—This is a first appeal, which has been filed by one of the defendants, namely, Messrs. Purshotam Dass Banarsi Dass from the decision of the 1st Additional Civil Judge, Kanpur in Suit No. 187 of 1952 dated 3rd August, 1956. The Union of India through the Deputy General Manager, Western Railway, filed this suit against Harshad Rai Natwar Lal Rawal, the Bank

of Baroda. Birhana Road, Kanpur, Shri Shiva Chandra Misra and Messrs. Purshottam Dass Benarsidass defendants 1 to 4 respectively. Messrs. Purshottam Dass Benarsi Dass have filed the present first appeal.

The reliefs sought by the Union of India in the suit were that a decree be passed against defendant no. 4, the present appellant firm asking it to return the suit goods viz. 248 bags of *zeera* and ordering it to pay compensation in respect of the fall in value by detention or otherwise consequent upon its wrongful retention, or alternatively that a decree be passed against defendant no. 4 that it should pay to the plaintiffs Rs.38,000 with interest at six per cent from the date of the suit till realisation, or in the alternative a decree be passed against defendants nos. 3 and 4 jointly and severally for Rs.38,000 with six per cent interest from the date of the suit till realisation. There were certain other reliefs claimed by the plaintiffs but they are now no more relevant for the purposes of the first appeal.

The facts alleged in the plaint put shortly are these: The Union of India was the owner of the Western Railway. Unjha and Kanpur Collectorganj are both stations on the system of the Western Railway, and the Union of India in its commercial capacity as Railway carriers operated in regard to transport of passengers and goods on and in between the aforesaid stations. On 20th July, 1950, Harshad Rai Natwar Lal defendant no. 1 booked a consignment of 248 bags of white *zeera* at Unjha for Kanpur Collectorganj. Railway Receipt No. 577283 dated 20th July, 1950 covered the consignment. It was consigned to self. Another consignment of one bag white *zeera* was likewise booked by the defendant no. 1 ex-Unjha to Kannauj and the number of the relative Railway Receipt was 577284 dated 20th July, 1950. This was also consigned to self. The first consignment was loaded in wagon no. 13973 to the extent of 130 bags, and

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wagon no. 11314 to the extent of 118 bags. They were despatched for destination by #12 Down shunting on 21st July, 1950. The consignment of one bag ex-Unjha to Kannauj was loaded in a T. R. van to its destination as it was a small consignment. Defendant no. 1 passed on the Railway Receipt in regard to one bag ex-Unjha to Kannauj to some cheats and sent the Railway Receipt with regard to the consignment of 248 bags ex-Unjha to Kanpur Collectorganj to the Bank of Baroda Kanpur branch with the request that the same be delivered to one Sitaldass Baldev Prasad, which was a fictitious name on payment of Rs.30,000 for which a Hundi was also drawn. The cheats went over to Kanpur and requested the Bank of Baroda for some time to return the Railway Receipt with regard to 248 bags. On 24th July 1950, the Bank of Baroda had received the Railway Receipt covering the consignment of 248 bags along with the Hundi for Rs.30,000 with direction as B. C. draft (bill to be collected) and not B. P. (bill purchased). The Bank of Baroda defendant No. 2 did not make any effort to find out if there was a firm by the name of Sitaldass Baldevdass in Nayaganj Kanpur. Nor did they ever present the Railway Receipt before 3rd August, 1950 before the plaintiffs. The cheats who were in possession of the Railway Receipt relating to the consignment of one bag ex-Unjha to Kannauj cleverly and fraudulently made forgery in the said Railway Receipt so as to convert it into Railway Receipt relating to the consignment of 248 bags ex-Unjha to Kanpur. They changed the last digit of the Railway Receipt and its destination from Kannauj to Kanpur Collectorganj. They effected delivery of the goods on 29th July, 1950 and 1st August, 1950 by endorsing the said Railway Receipt in favour of Shiv Chandra Misra defendant no. 3, in whose hotel at Meston Road, the said cheats were staying. Goods were thus obtained from the plaintiffs on the basis of a forged Railway Receipt by

defendant no. 3, Shiv Chandra Misra, in collusion with the cheats. The forgery in the document was such, that it could possibly not be detected by a naked eye although the Railway staff took every precaution and care that was expected of them while making the delivery of the consignment. The defendant no. 3 is thereafter alleged to have pledged the goods with defendant no. 4, the present appellant for a sum of Rs.15,700, but as the pledger, did not have any rights in the property pledged, the pledgee also did not derive any right in them. The possession and retention of the goods by defendant no. 4 was unauthorised, unjust and illegal and that defendant no. 4 was bound to return the goods to the plaintiff and pay compensation for loss or to pay the price thereof. It was further alleged that the Bank of Baroda could not spot out any person of the description of Baldeo Dass Sita Ram and had received a telegram from defendant no. 1 on 3rd August, 1950 and proceeded to enquire on phone from the Goods Supervisor at Kanpur Collectorganj whether goods as per Railway Receipt No. 577283 dated 20th July, 1950 ex-Unjha to Kanpur Collectorganj had arrived. Defendant No. 2 was then informed that the goods came in two wagons and that delivery of the same had been taken on the presentation of the Railway Receipt on 29th July, 1950 (contents of wagon No. 13314 for 118 bags) and on 1st August, 1950 (contents of wagon no. 13973 for 130 bags). Eventually the Bank sent its peon along with the original Railway Receipt, when the plaintiffs came to know that the goods delivered to defendant no. 3 were delivered on the basis of the forged Railway Receipt, and the plaintiffs then realized that the plaintiffs had been cheated in parting with the goods on forged Railway Receipt, of which the plaintiffs were in possession as bailees.

The plaintiffs immediately reported the incident to the Watch and Ward and the Government Railway

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Police authorities. Immediate action was taken, defendant no. 3 was contacted and interrogated and from him, clues with regard to the consignment of 248 bags of white *zeera* were found, and it became known that the said consignment was in the possession of defendant no. 4 and locked in their godown. The police seized the consignment in the godown of defendant no. 4. The cheats, however, could not be traced out by the police. At the instance of the Government Railway Police, the Railway Magistrate directed that the consignment be released in favour of the plaintiffs and that the defendant No. 4 be directed to hand over the goods to the Railway authorities. Defendant no. 4 went in revision before the District Magistrate from the aforesaid order of the Railway Magistrate, who in his turn referred the matter to this Court, Hon'ble M. C. DESAI, J. directed the police to retain the goods but did not decide the question of title to the same. Defendant no. 1 had been a party to the proceeding in this Court at Allahabad and was informed of the orders passed. Defendant no. 1 instead of filing a suit against the other defendants, filed suit no. 38 of 1951 in the court of the Civil Judge, Mehsana claiming Rs.34,000 and costs and interest against the plaintiffs. The suit was contested by the plaintiffs of the instant case and a written statement was filed. It was then alleged that the plaintiffs were entitled to file the instant suit as the goods were wrongly removed from the lawful possession of the plaintiffs.

Harshad Rai Natwerlal Rawal, the first defendant contested the suit and filed a written statement. Defendant no. 1 admitted that he passed the Railway Receipt for one bag in the ordinary course of business to his customer against the payment of price, but the receipt was not given to some cheats. It was also admitted that the other Railway Receipt relating to 248 bags was sent to the Bank of Baroda Kanpur, but it was denied that the

Bank was asked to give the receipt to some fictitious person of the name of Baldev Das Sitalram. It has also been said in the written statement that the defendant no. 1 was not aware that Sital Das Baldeo Prasad was a fictitious person. It is admitted that defendant no. 1 directed the Bank to deliver the Railway Receipt for 248 bags to Messrs. Sital Dass Baldeo Prasad against payment of Rs.30,000 for which a Hundi was drawn. It was alleged that the contents of the two Railway Receipts were so different that forged entries had to be made with regard to numerous matters. There was not only difference in the number of the digit of the printed number, but there were other differences also relating to the number of bags, the figures of weight, the amount of freight and places of destination. This being so, the forgery could not escape detection, but for the gross carelessness and negligence on the part of the Railway officials concerned. The first instalment of the consignment was delivered on 29th July, 1950 and the other instalment on 1st August, 1950. There was plenty of time to detect the forgery and get the person concerned arrested. The Railway staff failed to take precaution and care that they were bound to take. The forgery could be detected by naked eyes. It was then alleged that if some pledge in favour of defendant no. 4 is proved, the pledger having no title and interest could not pass any title or interest to defendant no. 4, and possession and retention of goods by defendant no. 4 was unauthorised, illegal and without title and it was defendant no. 4 who was responsible for the consequences thereof. It has been further stated in the written statement by defendant no. 1 that the Government Railway Police did not request the Railway Magistrate for an order for the disposal of the property. It was defendant no. 1, who moved the Magistrate. A report from the Government Railway Police was called for by the Railway Magistrate. The report was delayed. It was on

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the application of defendant no. 1 that the Railway Magistrate passed the order for the delivery of goods to the Railway authorities. The Railway authorities failed to make a move in the matter or to take possession of the goods from defendant no. 4. On account of carelessness and negligence of the Railway authorities, the matter was delayed, whereupon defendant no. 4 filed a petition in revision. The Railway did not contest the revision petition either before the Additional District Magistrate or the High Court. It was defendant no. 1, who contested the same in both the courts. Defendant no. 1, therefore, brought a special suit no. 18 of 1951 in the court of Civil Judge, Mehsana and when the plaintiffs, namely Union of India was served summons of that suit, the present suit was filed. It was admitted that that suit was being contested by the Union of India. There were no laches on the part of defendant no. 1 or defendant no. 2 in the matter. The Railway authorities were guilty of neglect and misconduct. The defendant no. 1 did not have any objection if a decree was passed in favour of the plaintiff against defendants nos. 3 or 4. Defendant no. 1 would be satisfied by getting payment of his claim in suit no. 18 of 1951. In view of the pendency of the suit at Mehsana, the present suit was not competent.

The Bank of Baroda defendant no. 2 also filed a written statement alleging that the plaint did not disclose any cause of action, and, therefore, the plaint was liable to be dismissed under O. 7, r. 11, C. P. C. as against the Bank. It was admitted that the Railway Receipt for 248 bags was sent by defendant no. 1 to the Bank but that it was not correct that defendant no. 1 had requested defendant no. 2 to give the receipt to a fictitious person Baldeo Das Sita Ram. The Bank was not aware that Baldeo Das Sita Ram was fictitious person. It was true that defendant no. 1 had directed the Bank to deliver Railway Receipt for 248 bags to Messrs.

Baldeo Dass Sita Ram against payment of Rs.30,000 for which a Hundi was drawn. The Bank had no knowledge of the alleged Railway Receipt for one bag of *zeera*. Nor did the Bank know that the person to whom the Railway Receipt for 248 bags was directed to be delivered was in possession of the other alleged receipt for one bag. The Bank, however, admitted that a gentleman describing himself to be a partner of Messrs. Baldeo Dass Sita Ram went to the Bank and expressed readiness to retire the Hundi within a short time. The Bank did not receive the payment of Rs.30,000 and interest from 28th July, 1950 which was a condition precedent to the delivery of the Railway Receipt under the direction of defendant no. 1. The Bank also said that in view of the nature of the forgery alleged, it should have been noticed and detected even at a casual glance. The Bank received a telegram whereupon the Bank sent its peon to the Railway Station, Kanpur with the Railway Receipt which when presented to the Assistant Goods Inspector, Kanpur was taken and kept by him into his custody and the peon was informed that the goods had already been cleared. The Goods Inspector also informed the Bank about it on phone. The Bank also further took up the case that there were no laches on the part of the Bank or defendant no. 1, and that delivery to a wrong person was due to misconduct and neglect on the part of the staff of the plaintiff.

In the written statement filed by Shiv Chandra Misra defendant no. 3 it was admitted that certain respectable and rich looking gentleman stayed as a passenger in the Hotel Nehru Nivas, Meston Road, Kanpur. He described himself as Harshad Lal Natwar Lal Rawal, Defendant no. 3 was working in the Hotel as its Manager. Defendant no. 3 was not guilty of any collusion with any cheat in obtaining the goods from the plaintiff. It was also asserted that the defendant no. 3 was not privy

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to the alleged pledgment of the goods. He, however, admitted that he got the goods released from the Railway authorities, but did so as a *bona fide* endorsee of the Railway Receipt as an agent. He did not obtain delivery of the goods wrongfully as alleged by the plaintiff. There was no cause of action against defendant no. 3. Sri Indramani, the elder brother of defendant no. 3 was the proprietor of the Hotel at Meston Road, Kanpur, known as Nehru Niwas and in 1948 when defendant no. 3 had to leave his studies on account of his failure in the VIII class, he was asked by Sri Indramani to help him in the management of the Hotel, and in that capacity, defendant no. 3 was working in the said hotel. The allegation with regard to the actual event, as made in the written statement of defendant no. 3 is that in the month of July, 1950, a respectable and rich looking gentlemen went to the hotel and rented a room. He held out that his name was Harshadrai Natwar Lal Rawal, and that he came from Unjha in Gujrat and that he was proposing to start business at Kanpur. He also said that he was a stranger to Kanpur and needed help in securing godown and office etc. for establishing business. Defendant no. 3 carried out his biddings in certain matters in the interest of the hotel. On the 29th July 1950, the aforesaid person endorsed a Railway Receipt to the defendant no. 3 and gave instruction to him to take delivery of the goods from the Railway authorities. Defendant no. 3 took delivery of the goods on 29th July, 1950 and 1st August, 1950 and got them stocked in the godown, which had been rented for that purpose. Defendant no. 3 had nothing to do with the dealings between the aforesaid person and the defendant no. 4. He did not act in collusion with any cheat. The plaintiff got defendant no. 3 arrested. Eventually he was released on bail. The police did not find any case against him and submitted a final report. Case against

him was, therefore, dropped. Defendant no. 3 was himself a victim of the fraud.

Defendant no. 4, the present appellant before us also filed a written statement and contested the suit. The story as disclosed in the written statement of defendant no. 4 is that on 31st July, 1950, four persons went to the shop of defendant no. 4 out of whom one gave out his name to be Harshad Rai and another as Shiv Chand. Defendant no. 4 is a firm of commission agents with an established reputation in the city. The person who had given out his name as Harshad Rai informed defendant no. 4 that he had 248 bags of *zeera* which he wanted to sell through commission agency of defendant no. 4. The aforesaid Harshad Rai also informed defendant no. 4 that he had a firm of long-standing styled as "Harshad Rai Natwar Lal" at Unjha in Gujrat and that he was one of its partners. The other person whose name was given out to be Shiv Chand was introduced by the aforesaid Harshad Rai as his Munim. The aforesaid Harshad Rai also told the defendant no. 4 that Shiv Chand would stay at Kanpur, look after the sales of the goods through the commission agency of defendant no. 4 on terms which had been settled between the parties. It was agreed that defendant no. 4 would advance only 65 per cent of the price of the said goods to the alleged Harshad Rai Natwar Lal, and that the usual expenses, interest, commission etc. would be charged according to the market usage. After the said goods had been sold, account would be adjusted and if there was any balance found due to the said firm, that would be paid. On the same date, the aforesaid Harshad Rai brought 118 bags of *zeera* to the shop of defendant no. 4 loaded on a *thela* and another consignment of 130 bags was likewise brought to the shop of defendant no. 4 on 1st of August, 1950. At the request of the alleged Harshad Rai, a sum of Rs.1,000 exclusive of *thela* charges

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was paid by defendant no. 4 to Shiv Chand on 1st August, 1950. Goods were duly credited and payment debited to the account of the firm styled Harshad Rai Natwar Lal. A receipt for the payment of Rs.1,000 was also obtained from the said Shiv Chand in the *dastkhati bahi* of defendant no. 4. A further sum of Rs.15,000 was paid to the alleged Messrs. Harshad Rai Natwar Lal by the defendant no. 4 on the security of the aforesaid goods under a crossed cheque no. 1/0-54287 drawn in favour of Messrs. Harshad Rai Natwar Lal on the Allahabad Bank Ltd. Kanpur on the 2nd August, 1950. The cheque was received by Shiv Chand who signed acknowledgment thereof in the *dastkhati bahi* of defendant no. 4. On 3rd August, 1950. the said Harshad Rai and Shiv Chand again visited the shop of defendant no. 4 and talked about business. While leaving the shop the said Harshad Rai demanded a further sum of Rs.700 which was paid to him in the same account against receipt in the *dastkhati bahi*. Defendant no. 4 was further required to send a letter to firm Harshad Rai Natwar Lal giving the details of the aforesaid payments. The defendant no. 4 advanced, in due course of business, a sum of Rs.16,700 exclusive of *thela* charges, to the aforesaid persons in good faith and *bona fide* on the security of the aforesaid goods, honestly believing that they were dealing with a customer. The allegation of the plaintiff that no right in the goods in dispute passed on to defendant no. 4 and that the possession and retention of the goods by defendant no. 4 was unauthorised and illegal, was denied. Defendant no. 4 was not bound to return the goods or pay compensation for loss or to pay price of the goods to the plaintiff. It was admitted that the goods were seized by the police from the godown of the answering defendant. It was then alleged that the Government Railway Police moved the Railway Magistrate for the release of the goods in favour of the

plaintiff and he had passed an order on the 6th December, 1950 to that effect. It was further asserted that it was the duty of the Railway administration to satisfy itself that delivery was made on the proper Railway Receipt and to the proper person. Invoices were made in triplicate by means of carbon paper, the first of which is for the record, the second is the Railway Receipt and the third for the invoice foil. The contents of the invoice are copied out in the delivery book so that the Railway Receipt when presented could be checked on their basis at the time of delivery. The plaintiff was grossly negligent in not checking and discovering the alleged forgery which must have been of a multiple character at the time of making delivery of 248 bags of *zeera* to some cheat. Both defendant no. 1 and the plaintiff enabled the alleged cheat to take delivery of the goods in question by their gross negligence and the plaintiff further misconducted himself in giving delivery to the cheat. There were no suspicious circumstance about the pledge of the goods with defendant no. 4. The defendant no. 4, therefore, took the pledge *bona fide* and in good faith without any notice of the defect in the title of the pledger. The position of the defendant no. 4, therefore, was that of an innocent holder for value and defendant no. 4, was therefore, entitled to legal protection. Suit for recovery of the goods by the plaintiff was barred by estoppel by negligence. As the defendant no. 1 and the plaintiff enabled the alleged cheat to occasion the loss, they themselves are liable to suffer the same, as according to the defence, it was a well settled principle of equity that wherever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss, must sustain it. Defendant no. 4 further claimed as a set-off of its due against the value of the goods in question. It was then alleged that as defendant no. 1

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who was the consignor and was a party to the proceeding before the Railway Magistrate regarding the goods in question, had not chosen to take any action against defendant no. 4, the plaintiff could not proceed against defendant no. 4 as the rights of the plaintiffs were in no way independent of those of the consignor. The position of the plaintiff was that of a bailee-cum-agent of defendant no. 1 and plaintiff acted as agent of defendant no. 1 in giving delivery of the consignment, as such the plaintiff did not have any right to institute and maintain any action against defendant no. 4. A further plea was taken that the value of the goods in dispute had been highly inflated by the plaintiff and that the plaintiff could claim only that value which the sale of the goods in question fetched, inasmuch as such sale was within the knowledge of defendant no. 1 as well as the plaintiff and the goods were sold to avoid loss to the parties.

The court below framed a large number of issues, which arose on the pleadings of the parties.

On the question whether the plaintiff had the right to sue, it held that the plaintiff did have a right of suit against defendant no. 4 also. It further found that the Railway Receipt on the basis of which delivery of the goods was taken was forged and that therefore none of the persons who possessed the goods after delivery from the Railway had any legal title to it. The person who posed as Harshad Rai was a mere imposter and a cheat. The plaintiff had been wrongfully deprived of the goods by a person who had no title to them. The court below further took the view that the person who pledged the goods with defendant no. 4 had no title to them. Defendant no. 4 did not, therefore, get any title to the goods. The further conclusion arrived at by the court below is that defendant no. 4 was an innocent holder for value, yet defendant no. 4 could not get title to the

goods in law. S. 27 of the Sales of Goods Act could not give any protection to defendant no. 4. The Court below also took the view that no case had been made out to show that there was any conduct of the plaintiff which precluded it from denying the authority of the cheat to keep the goods in the commission agency of defendant no. 4. Another important finding returned by the court below is, that the plaintiff was not guilty of any negligence in the matter of delivery of the goods to defendant no. 3. This being so, there was no estoppel by negligence which could be used against the plaintiff's claim. On the plea of set off, court below observed that although such a plea was raised in the written statement, but the same had been withdrawn by the counsel for the defendant by his statement dated 29th March, 1954. The plaintiff was entitled to file the suit as bailee and the question of any personal injury or damage to the plaintiff did not arise. But the court below also noticed that the defendant no. 1 the consignor had obtained the decree against the plaintiff and the plaintiff had paid up that claim. In that view of the matter, plaintiff did suffer damage. It was also found that the plaintiff had failed to prove actual collusion between defendant no. 3 and the cheat, but that defendant no. 3 was also liable to pay damages to the plaintiff as he had committed the tortuous acts of trespass and conversion. On the question of quantum of damages, the court below came to the conclusion that the proper value to be fixed was Rs.30,000 on the payment of which amount, the Railway Receipt was directed by defendant no. 1 to be delivered. The court below also examined the evidence with regard to the market rate in the first week of August, 1950 and came to the conclusion that the rate was Rs.100 per 50 seers or Rs.80 per standard maund. Calculating on that basis, court below fixed the figure at Rs.29,760 on that count, and added a sum of Rs.240 by way of

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price of 248 containers. Court below, accordingly fixed the value at Rs.30,000. On such findings court below proceeded to decree the suit against defendants nos. 3 and 4 for a sum of Rs.30,000 with *pendente lite* and future interest at the rate of three per cent per annum. The rest of the suit was dismissed. So far as defendants nos. 1 and 2 are concerned, they had been exempted by the plaintiff and, therefore, no question of a decree against them arose.

Shri Shiv Chand Misra defendant no. 3 has submitted to the decree and has filed no appeal in this Court. The appeal before us is an appeal filed only by defendant no. 4. Consequently, we have to decide the same on that basis.

In support of the appeal, learned counsel for the appellant has urged that on the facts and circumstances of the case, it is clear that defendant no. 1, the consignor himself was guilty of fraud and deceit. In making forgery in the Railway Receipt relating to one bag of consignment so as to change it into a Railway Receipt for the consignment of 248 bags, it was necessary that the forger should have had possession of both the receipts. The only person who had possession of both the receipts at one time was the consignor. It was also suggested that the Bank employees may have been taken into confidence by the cheats to enable them to gain their object. According to the learned counsel, if that be so, then the case had to be decided on other principles and plaintiff's suit could not be decreed.

We, however, are unable to entertain that submission owing to the fact that no such plea had been raised by the appellant in its written statement, and such a case has not undergone trial. The defence raised by the appellant as a whole clearly excludes the plea that is now sought to be introduced.

In para 31 of the written statement, the case taken by the appellant was that the defendant no. 1 and the plaintiff enabled the alleged cheat to take delivery of the goods in question by their gross negligence. In para 34 of the written statement, the plea taken is to the same effect and further that the defendant no. 1 and the plaintiff enabled the alleged cheat to occasion loss and that therefore defendant no. 1 and plaintiff were liable to suffer the same. It is also alleged that out of two innocent persons, who must suffer loss on account of the acts of a third person, he who has enabled such third person to occasion the loss must sustain it. These averments in the written statement clearly exclude the plea that is now sought to be agitated before us.

The next argument advanced by the learned counsel for the appellant is based on the principle of equity that wherever one of two innocent persons must suffer by the act of third, he who enables such person to occasion the loss must sustain it. It has been submitted that the Railway in giving delivery to a wrong person acted grossly negligently and on account of such conduct of the Railway, the cheat was enabled to occasion the loss and the plaintiff was estopped from denying the title of the cheat. This being so, it was for the Railway to suffer loss and not for defendant no. 4. In support of his argument, learned counsel invited our attention to the case of *K. M. Mohambaram v. Ram Narayan Brahmin* (1). In that case, the defendant-appellant and plaintiff-respondent put forth rival claims to the ownership of a motor bus. The facts of the case were that the defendant-appellant was the original owner of the bus and was in possession of the registration certificate relating to the same. In May 1932, the defendant-appellant arranged with one A. Mudaliar that the latter should run the bus as his agent and left with him a letter signed by himself addressed to the District Magistrate requesting that 'G' permit be transferred to A.

(1) A.I.R. 1935 Mad. 850.

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Mudaliar. Mudaliar in his turn altered this letter without the knowledge of the appellant into one addressed to the District Superintendent of Police and requesting the transfer to him of the registration certificate. The registration certificate was accordingly transferred and the plaintiff-respondent thinking that Mudaliar was the owner of the bus, purchased the same from him. The *bona fide* nature of the respondent's purchase was not contested and the question that arose in that case was as to which party was to suffer as a result of Mudaliar's fraud. As it was a case of sale, their Lordships referred to s. 27 of the Sales of Goods Act. The relevant part of s. 27 Sales of Goods Act is as follows:

"Where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

In that case, the court below had found that the conduct of the defendant was blameworthy inasmuch as he had no right to leave the registration certificate along with other papers in the bus and it was his duty to keep that certificate in his own possession. Further it had held that it was the duty of the defendant to have inspected the papers from time to time to assure himself that his agent had committed no fraud and that he should have issued some kind of public notice to obviate the possibility of any innocent would-be purchaser being defrauded. Their Lordships of the Madras High Court, however, did not agree with the aforesaid finding of the trial court. The view taken by the High Court was that on that basis the decision of the court below could not be sustained. Another argument, in that case to support the decision of the trial court, was that it was

not necessary to find out that the appellant's conduct had been blameworthy. According to that argument, s. 27 of the Sales of Goods Act embodied the English rule of equity, which was said to have been very succinctly laid down by ASHHURST, J. in the case of *Lickbarrow v. Mason* (1) in the following words:

"That wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

Their Lordships accepted the principle relating to interpretation of s. 27 of the Sales of Goods Act, and proceeded to examine English cases in which its application had been considered. The case on which the learned counsel for the appellant has based his argument is the case of *Henderson and Co. v. Williams* (2). This was the first case that was examined by their Lordships of the Madras High Court in the case before them. In the case of *Henderson and Co.* (2) the dictum laid down by Lord Halsbury was that the true owner having enabled Fletcher to hold himself out as the owner, could not set up his title against that of the purchaser. The other case that was considered by the Madras High Court is the case of *Commonwealth Trust Ltd. v. Akotev* (3). In that case also, the appellant's title was affirmed, on the rule of equity which we have already quoted earlier. After considering those two English decisions, their Lordships of the Madras High Court observed:

"Now it is clear from an analysis of these two cases that when the real owner 'enables' a third party to occasion a loss, he must by his own act put him directly in a position to do so."

Their Lordships found that in *Henderson and Co.'s* case (2) the owners had definitely put the sugar at the dis-

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(1) (1787) 2 Term Rep. 63 at p. 70. (2) (1895) 1 Q. B. 521.

(3) 1926 A. C. 72.

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posals of Fletcher, and in the latter case the owners had definitely sent to Laing the documents which would give him the right to take the cocoa from Railway company and hold it as if it were his own. By the direct act of the owners, therefore, in each case Fletcher and Laing were in a position to dispose of the goods, and as it was this direct act which gave them that authority, the owners were naturally held to be precluded by their conduct from denying the title of Fletcher and Laing to sell. Examining the facts of the case that was before their Lordships of the Madras High Court, it was observed that the facts of that case were quite different from the facts of the two English cases. The defendant-appellant had undoubtedly put Mudaliar in possession of the bus and had left him also in possession of the document of title to it. That document was, however, in appellant's own name and unless it was transferred in the name of Mudaliar, Mudaliar could not have right to dispose of the bus. The mere fact that the registration certificate was left with Mudaliar alone was not sufficient. It was also observed that it was not possible to argue that the appellant ought to have contemplated the possibility of forgery and fraud on Mudaliar's part. The decision in the Madras case, therefore, does not support the case of the appellant before us. The learned counsel for the appellant, however, apart from the decision of that case, relied on the above-quoted dictum laid down by ASHHURST, J. in *Lickbarrow v. Mason* (1).

The rule stated by ASHHURST, J. in *Lickbarrow v. Mason* (1) came up for consideration before the Privy Council in *Mercantile Bank of India Ltd. v. Central Bank of India Ltd.* (2). The appellant in that case also claimed to have succeeded upon the basis of that rule stated by ASHHURST, J. Again in that connection, the decision in the case of *Commonwealth Trust*

(1) (1787) 2 Term Rep. 63 at p. 70. (2) A.I.R. 1938 P. C. 52.

Co. v. Akotev (1) was cited to show the application of the aforesaid rule stated by ASHHURST, J. In that case, the Full Court of the Gold Coast had held that no property had passed because the merchant had no title. That judgment was reversed by the Privy Council, which had made the following observations:

"To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason* (2)."

The Privy Council in the *Mercantile Bank case* (3) took the view that what was stated there, in the Commonwealth Trust case, could cover the case if it was applied without qualification. Their Lordships, however, found it impossible to accept without qualification as a true statement of law the principle that had been broadly laid down and observed that that case was not one which it would be safe to follow. The Privy Council then referred to the case of *Jones Ltd. v. Waring and Gillow Ltd.* (4) and noticed that Lord Sumner in that case had observed:

"There was no duty between *Jones Ltd.* and *Waring and Gillow Ltd.* and without that, the wide proposition of ASHHURST, J. in *Lickbarrow v. Mason* (2) would not apply. . . ."

Their Lordships held that Lord Sumner in that case put the principle of estoppel as depending upon a duty, but the passage from the judgment in the case

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(1) 1926 A.C. 72.
(3) A.I.R. 1938 P.C. 52.

(2) (1787) 2 Term Rep. 68 at p. 70.
(4) (1926) A.C. 670.

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of *London joint Stock Bank v. Macmillan* (1) pointed out that the rule expressed by ASHHURST, J. was too wide and said that the accurate rule was stated by BALCKBURN, J. in *Swan v. North British Australasian Co.* (2). Referring to the judgment of the Court below of Wilde, B. in that case LORD BALCKBURN, J. said:

"He omits to qualify the rule he has stated by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into the mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."

In the case of *Faquharson and Co. v. King and Co.* (3), an observation was made by Lord Lindley to the same effect. Lord Lindley also expressed the view that the dictum of ASHHURST, J. was too wide. It was also noticed that the observation made by ASHHURST, J. was not necessary to the decision of the case which was before his Lordship. Another case that was noticed by the Privy Council is the case of *Johnson v. Credit Lyonnais* (4). It was found that the decision in *Commonwealth Trust Co. v. Akotev* (5) was also inconsistent with the case last referred to. In the *Johnson's case* (3), it was held that the conduct of the plaintiff in leaving the dock warrants, which were the *indicia* of title, in the hands of a vendor of the goods after he had been paid by the plaintiff as purchaser, without any change being made in the books of the dock company,

(1) (1918) A.C. 777.

(3) (1902) A.C. 325.

(5) 1926 A. C. 72.

(2) (1863) 2 H. and C. 175.

(4) (1878) 26 W.R. 195.

did not disentitle the plaintiff from claiming for conversion against the defendants, who in good faith made advances to the fraudulent vendor on the security of the dock warrants thus left in his hands. It was further held that in a sense, the plaintiff by leaving the *indicia* of title in the vendor's hands had enabled him to defraud the defendants, but it was noticed in the judgment of the court below that COCKBURN, C. J. had observed as follows:

"The case for the plaintiffs rests on the general proposition of law—which as a general proposition cannot be contested—that the mere possession of the property of another, without authority to deal with the thing otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party however innocent in the transaction the latter party may have been."

In the instant case, assuming that the Railway authorities were negligent in effecting delivery on the basis of Railway Receipt presented by defendant no. 3, the question that arises is whether the act of defendant no. 4 in accepting to advance money on the pledge of the commodity was the proximate result of such negligence on the part of the Railway authorities. From a perusal of the written statement of defendant no. 4, it is obvious that the representations on the basis of which defendant no. 4 agreed to advance money on the security of the commodity to the persons concerned, were to the effect that those persons were really Harshad Rai and Shiv Chand; that Harshad Rai and Shiv Chand had 248 bags of *zeera* which they wanted to sell and (by implication were entitled to sell); that the aforesaid Harshad Rai had a firm of long-standing styled as Harshad Rai Natwar Lal at Unjha, Gujrat and that he was one of

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its partners; that the other person was Shiv Chand and that Shiv Chand was the Munim of Harshad Rai Natwar Lal. It was the result of acting upon the aforesaid representations that the defendant no. 4 agreed to enter into the transaction. The entering into the transaction by the defendant no. 4 was not caused by any representation to the effect that the consignment had been delivered to these persons by the Railway authorities under Railway Receipt. This being so, it cannot be said that the neglect of the Railway authorities in relation to the delivery of the goods on the basis of the Railway Receipt was responsible for inducing the defendant no. 4 to enter into the transaction. All that can be said against the Railway authorities is that they should not have delivered the consignment on the basis of the Railway Receipt presented before them. In giving delivery on the basis of that Railway Receipt, it cannot be said that the Railway authorities were doing something which could induce others to believe that the person holding the consignment, was the real owner thereof or that he had a right to deal with the same. We are, therefore, of the view that the claim of the plaintiff is not liable to be defeated on that basis.

It was then urged that the true owner of the goods in question was defendant no. 1 and not the Railway. The Railway was not entitled to file the suit for the recovery of the goods or its price against defendant no. 4 with whom the goods had been pledged and who had acted in good faith and paid consideration for the transaction. It is not disputed that the position of the Railway as public carrier is that of a bailee.

Learned counsel for the respondent has invited our attention to s. 180 of the Indian Contract Act and has urged that as bailee, the Railway is as much entitled to file the suit for recovery of the goods from defendant no. 4 as the bailor himself.

On behalf of the appellant, it was also urged that in giving delivery to a wrong person, the Railway as bailee was liable to be sued for conversion. The Railway, therefore, was a tortfeasor and as such was not entitled to sue. We have no doubt in our mind that bailee is competent to file a suit for recovery of the goods fraudulently or forcibly taken out of his possession by persons without title. In view of the facts of the case, it is hardly necessary to enter into discussions with regard to the rights and liabilities *inter se* the bailor and bailee. What is apparent on the facts of this case is that while the plaintiff was in lawful possession of the goods as bailee, possession of the same was by an act of fraud taken by defendant no. 3. It could not be urged with any force that the Railway whose lawful possession had been wrongly disturbed could not recover the goods from defendant no. 3. We are unable to accept the submission that this right of the plaintiff to recover the goods from the hand of the defendant no. 3 would stand negatived only because defendant no. 3 or persons for whom defendant no. 3 acted as agent, managed to pass on the possession of the goods to defendant no. 4 as pledgee thereof. It may be that the defendant no. 4 acted in good faith and paid consideration to the pledgers, but that to our mind could not defeat the right of the Railway to recover the goods from the possession of defendant no. 4. S. 27 of the Sales of Goods Act is a provision relating to sale and not a provision relating to a transaction of pledge. No provision of law has been pointed out to us in support of the contention that the plaintiff is not entitled to recover the goods under the circumstances of the cases from the possession of defendant no. 4, except the rule of equity which we have already dealt with.

In the view that we have taken, it is not necessary to discuss various other cases that have been cited at the Bar.

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On the question of *quantum* of damage, or price, the learned counsel for the appellant has urged that the goods had been seized on the 3rd August 1950 by the police and they were ultimately sold by the defendant no. 4 in the middle of October 1951. The quantum should have been fixed according to the market rate in October 1951 and the estimate of the value made by the court below is consequently erroneous. On the facts of this case, however, we are of the view that the responsibility for the delay must be placed on defendant no. 4. When the Railway Magistrate had directed the release of the goods in favour of Railway, it was defendant no. 4 who preferred the revision which was ultimately referred to the High Court. On account of the aforesaid proceedings taken by the defendant no. 4, the goods could not be restored to the Railway earlier. We have considered the reasoning of the Court below in fixing the amount recoverable by the plaintiff and we do not find any good reason to differ from that view.

We, therefore, do not find any force in this appeal, which is hereby dismissed with costs.

Appeal dismissed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Subba Rao, Chief Justice, The Hon'ble Mr. Justice Shah, the Hon'ble Mr. Justice Sikri, the Hon'ble Mr. Justice Ramaswami and the Hon'ble Mr. Justice Vaidialingam.

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... RESPONDENT.

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(ON APPEAL FROM THE HIGH COURT AT
ALLAHABAD)

Constitution of India (1950), Art. 311(2)—Civil Service Regulations (as amended by U. P. Government) Art. 265-A—Compulsory retirement showing on its face the ground that the servant has outlived his utility—Order of, passed without following procedure prescribed under Art. 311(1)—Whether valid.

An order of compulsory retirement involving, like dismissal or removal, the loss of benefit already earned—showing on its face the reason that the Government servant has 'outlived his utility' casts on him a stigma and is therefore punitive. If, as is admittedly the position in this case, the order is passed without following the procedure prescribed by Art. 311(2) of the Constitution, it would be illegal and liable to be quashed.

Civil Appeal No. 997 of 1965 from the Judgment and Order dated the 25th July, 1963 of the Allahabad High Court in Special Appeal No. 431 of 1962.

S. V. Gupte, Solicitor-General of India and *C. B. Agarwala* (*O. P. Rana* with them) for the Appellant.

J. P. Goyal and *B. P. Jha*, for the Respondent.

The following Judgment of the Court was delivered by—

SIKRI, J. :—The respondent, Shri Madan Mohan Nagar filed a Writ Petition in the High Court of Judicature at Allahabad for quashing the order of compulsory retirement dated July 28, 1960, passed against him. The

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order of compulsory retirement was in the following terms:

"I am directed to say that the Governor has been pleased to order in the public interest under Article 465A and Note (1) thereof of the Civil Service Regulations, the compulsory retirement with effect from September 1, 1960 of Sri Madan Mohan Nagar, Director State Museum Lucknow who completed 52 years of age on July 1, 1960, and 28 years and 3 months of qualifying service on 31st May, 1960, as he has outlived his utility."

The learned Single Judge who heard the Petition quashed the order on the ground that "R. 465 of the Civil Service Regulations as amended by the U. P. Government while providing a criterion for the guidance of Government when inflicting compulsory retirement on a government servant nevertheless violates the guarantee of equality of opportunity in matters relating to employment under Art. 16(1)" of the Constitution. He further held that the order inflicting compulsory retirement on the petitioner was invalid because it was passed in violation of the principles of natural justice.

The State appealed and the Division Bench on appeal upheld the order passed by the learned Single Judge on the ground that the order of compulsory retirement was passed in violation of the provisions of Art. 311 of the Constitution and was, therefore, *ultra vires*. The State having obtained special leave, the appeal is now before us.

Before we deal with the arguments of the learned counsel for the appellant, we may give a few facts and set out Art. 465A and Note (1) thereof of the Civil Service Regulations, as amended by the Government of

Uttar Pradesh. The facts, in brief, are that the respondent was first appointed in 1931 on one year's probation to the post of Custodian, Sarnath Museum, Banaras, under the Archaeological Department of the Government of India. In 1939, he was posted to Mathura Museum as Curator, and he was appointed substantively to this post from January 5, 1941. Later, he was appointed on the recommendation of the Provincial Public Service Commission as Curator of the State Museum, Lucknow, on a scale of pay Rs.250 to Rs.850. The post of Curator was upgraded to the post of Director, State Museum, Lucknow, in the U. P. Educational Service, Senior Scale, and the respondent was appointed to it. Thereafter the respondent continued in service as Director of State Museum, Lucknow, until he was compulsorily retired by the order of the Government, dated July 28, 1960, which has already been set out above. It is common ground that no enquiry as contemplated by Art. 311(2) was held.

The relevant part of Art. 465A of the Civil Service Regulation is in the following terms:

"Government retains the right to retire any Government servant after he has completed 25 years qualifying service without giving any reasons, and no claim to special compensation on this account shall be entertained.

This right shall only be exercised by Government in the Administrative Department when it is in the public interest to dispense with the services of Government servant who has outlived his usefulness."

The learned Solicitor-General, who appears on behalf of the appellant has urged that the fact that the impugned order of compulsory retirement states the

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reason for compulsory retirement, namely, that the respondent had outlived his utility, does not lead to the conclusion that the order amounts to dismissal or removal because in every case of compulsory retirement it is implied that the person who is compulsorily retired had outlived his usefulness. He refers to *Shyam Lal v. The State of Uttar Pradesh* (1) and says that in that case it was implied that Shyam Lal was not fit to be retained in service. We are unable to read *Shyam Lal's case* (1) in that manner because the Court expressly said at p. 41, as follows:

"It is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be the real cause for taking the action but what is important to note is that the direction in the last sentence in Note 1 to Art. 465-A make it abundantly clear that an imputation or charge is not in terms made a condition for the exercise of the power. In other words, a compulsory retirement has no stigma or implication of misbehaviour or incapacity."

In the present case there is not only no question of imputation but a clear statement appears on the face of the order that the respondent had outlived his utility, in other words, it is stated that he was incapacitated from holding the post of Director, State Museum, Lucknow. The order clearly attaches a stigma to him and any person who reads the order would immediately consider that there is something wrong with him or his capacity to work.

In our opinion this case is covered by the principle applied in *Jagdish Mitter v. Union of India* (2).

It is true that that was a case of a temporary servant, but that does not matter. The order in that case

(1) (1955) 1 S.C.R. 26.

(2) A.I.R. (1964) S.C. 449.

reads as follows:

"Shri Jagdish Mitter, a temporary 2nd Division Clerk of this office having been found undesirable to be retained in Government service is hereby served with a month's notice of discharge with effect from November 1, 1949."

GAJENDRAGADKAR, J., as he then was, speaking for the Court, said:

"No doubt the order purports to be one of discharge and as such can be referred to the power of the authority to terminate the temporary appointment with one month's notice. But it seems to us that when the order refers to the fact that the appellant was found undesirable to be retained in government service it expressly casts a stigma on the appellant and in that sense must be held to be an order of dismissal and not a mere order of discharge."

Later, he observed:

"It seems that anyone who reads the order in a reasonable way, would naturally conclude that the appellant was found to be undesirable, and that must necessarily import an element of punishment which is the basis of the order and is its integral part. When an authority wants to terminate the services of a temporary servant, it can pass a simple order of discharge without casting any aspersion against the temporary servant or attaching any stigma to his character. As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it would be idle to suggest that the order is a simple order of discharge. The test in such cases must be: does the order cast aspersion or attach stigma to the officer when it purports to discharge him? If

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the answer to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance, to amount to dismissal."

It seems to us that the same test must apply in the case of compulsory retirement, namely: does the order of compulsory retirement cast an aspersion or attach a stigma to the officer when it purports to retire him compulsorily? In the present case there is no doubt that the order does cast a stigma on the respondent.

Mr. Gupte relies on *T. G. Shivacharana Singh v. State of Mysore* (1). But this case does not assist him because it does not appear that the order in that case contained any stigma, and under R. 285 of the Mysore Civil Service Rules, 1958, retirement could be effected if it was considered necessary in the public interest. There was no question of requiring that there should be a finding that the government officer had outlived his utility.

In *Ram Parshad v. State of Punjab* (2) no such question appears to have been argued. In para. 32 of the judgment SATYANARAYANA RAJU, J., while considering the validity of R. 27 of the Staff Rules, reproduced an extract from the judgment of this Court in *Moti Ram Deka v. N. E. Frontier Railway* (3). We will presently consider the effect of the decision in *Deka's case* (3).

In *Deka's case*, (3) Moti Ram Deka, who was a peon employed by the North East Frontier Railway, challenged the order of termination of his services under Rule 148 of the Indian Railway Establishment Code on the ground that the said Rule was invalid. There were some other appellants before the Court who challenged the validity of R. 149 of the Railway Establishment Code. The question posed for decision by GAJENDRA-GADKAR, J., at page 699 was: if the service of a perma-

(1) A.I.R. (1965) S.C. 280.

(3) (1964) 5 S.C.R. 683.

(2) A.I.R. (1966) 5.C. 1507.

nent civil servant is terminated otherwise than by operation of the rule of superannuation, or the rule of compulsory retirement does such termination amount to removal under Art. 311(2) or not? The Court was thus not concerned with the question of compulsory retirement under a rule similar to R. 465-A, note (1), of the Uttar Pradesh Civil Service Regulation, but it reviewed some cases dealing with compulsory retirement. SUBBA RAO, J., as he then was, who delivered a concurring judgment, also reviewed the cases, but he preferred to follow the principle laid down in *Parshotam Lal Dhingra v. Union of India*, (1) in respect of permanent Government servants in preference to that accepted in *Shyam Lal's case* (2) and the subsequent decisions following it. But it is not necessary for us to resolve the conflict, if any, which exists between *Dhingra's case* (1) and *Shyam Lal's case* (2) because here we have an order which on the face of it casts a stigma on the respondent. It is true, as pointed out by SUBBA RAO, J., that in *Doshi's case* [(*State of Bombay v. Saubhagchand M. Doshi*) (3)] R. 165-A of the Bombay Civil Services Rules laid down that the right of compulsory retirement will not be exercised except when it is in the public interest to dispense with the further services of a Government servant such as on account of inefficiency or dishonesty, but in *Doshi's case* (3) it does not appear that the order contained any aspersion that Doshi was inefficient or suffered from some other defect. What was challenged in that case was the validity of R. 165-A of the Bombay Civil Services Rules, and it was held that it did not violate Art. 311(2) of the Constitution.

Similarly, in *Balakotaiah v. The Union of India* (4) in R. 3 of the Railway Services (Safeguarding of National Security) Rules, 1949, dealing with compulsory retirement, the proviso provided that "a member of the Railway Service shall not be retired or have his service so

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(1) (1958) S.C.R. 828.

(2) (1955) 1 S.C.R. 26.

(3) (1958) S.C.R. 571.

(4) (1958) S.C.R. 1052.

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terminated unless the competent authority is satisfied that his retention in public service is prejudicial to national security, and unless, where the competent authority is the Head of a Department, the prior approval of the Governor-General has been obtained." In this case also it does not appear that the order terminating the services contained any stigma on the public servant concerned.

In *Dalip Singh v. State of Punjab* (1) the order read as follows:

"His Highness the Rajpramukh is pleased to retire from service Sardar Dalip Singh, Inspector General of Police, PEPSU (on leave) for administrative reasons with effect from the 18th August, 1950."

It was held that the order did not amount to dismissal or removal from service within the meaning of Art. 311 (2) of the Constitution. The Court derived two tests from *Shyam Lal's case* (2) and formulated them as follows: the first is whether the action is by way of punishment and to find that out the Court said it was necessary that a charge or imputation against the officer is made the condition of the exercise of the power; the second is whether by compulsory retirement the officer is losing the benefit he has already earned as he does by dismissal or removal. If the first test is applied in this case it is quite clear that the charge or imputation "that the respondent had outlived his utility" was made the condition of the exercise of the power.

The learned Solicitor General also brought to our notice the decision of the Full Bench of the Allahabad High Court in *Abdul Ahad v. The Inspector General of Police, U. P.* (3). The decision certainly helps him, and as a matter of fact, the Full Bench overruled the

(1) (1961) 1 S.C.R. 88.

(3) A.I.R. 1965 All. 142

(2) (1955) 1 S.C.R. 26.

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judgment of the Division Bench under appeal. But, with respect, we are unable to agree with the conclusion that even if the order of compulsory retirement recites the fact that the public servant had outlived his utility, it would not amount to a punitive order. The Full Bench was of the view that "compulsory retirement will always be on the ground that he can no longer render useful service. The position certainly does not become worse because what is implied is expressed." We are unable to agree that the position does not become worse because a stigma is attached expressly.

We may say that the question whether Art. 465-A, note (I), violates Art. 311 of the Constitution was not argued before us and we say nothing about it.

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

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PONDENTS.

(ON APPEAL FROM THE HIGH COURT AT
ALLAHABAD).

Security Deposit—*Whether a trust or simply a debt—How decided.*

The answer to the question whether a security deposit is impressed with a trust or amounts simply to a debt rests on the terms of the agreement and the facts and circumstances including the conduct of parties in each case without leaning one way or the other on account of the fact that the money was paid as a security deposit.

Absence of any provision for segregation of the security deposit and the stipulation for payment of interest thereon and of its being treated at par with commission would, as in this case, negative the claim of there being a trust and as such of a preferential payment with the result that it will rank as an ordinary debt in the event of the debtor company going into liquidation.

Civil Appeal No. 891 of 1964 from the Judgment and Decree dated the 30th October, 1961 of the Allahabad High Court in Letters Patent Appeal No. 83 of 1951.

N. C. Chatterjee and B. C. Misra (B. R. G. K. Achar and M. V. Goswami with them) for the Appellant.

Chaman Lal Pandhi and S. L. Pandhi, for the Respondents.

The following Judgment of the Court was delivered by—

WANCHOO, J.—This is an appeal by special leave against the judgment and decree of the Allahabad High Court. The appellant is a registered partnership carrying on business at Kanpur. It entered into an agreement in December 1948 with the Vijai Lakshmi Sugar Mills Limited, Doiwala, District Dehra Dun (hereinafter referred to as the Mills) and was appointed sole selling agent of the Mills. According to the terms of the agreement, the appellant deposited a sum of Rs.50,000 as security for due performance of the contract, and this amount was to carry interest at the rate of Rs.6 per cent per annum to be paid by the Mills. In November 1949 an order was passed winding-up the Mills and this happened before the period of agency came to an end. Consequent on the winding-up of the Mills, the appellant made an application in September 1950 by which it prayed for refund of security deposit along with interest. It was also prayed that the Mills held the deposit as trustee and in consequence the appellant was entitled to priority with respect to the amount of Rs.50,000. In addition, there was a claim of Rs.24,500 with respect to commission. That claim was given up and we are now not concerned with it.

The liquidators admitted that there had been an agreement as alleged by the appellant and that a sum of Rs.50,000 had been deposited with the Mills. But their case was that this amount was an ordinary debt with respect to which the appellant could not claim any preference and that the appellant's contention that the amount deposited was a kind of trust with the Mills was not correct. The only question that had to be decided therefore was whether the amount of Rs.50,000 deposited as security for due performance of the con-

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tract of sole selling agency was in the nature of a trust which was entitled to preference or was an ordinary debt.

The learned Company Judge held on a construction of the agreement that the amount was an ordinary debt. He referred in this connection to the apparent conflict between the decisions of the Calcutta and Madras High Courts on one side and the Allahabad and Bombay High Courts on the other but was of opinion that this conflict was largely illusory as the question whether the deposit in a particular case was in the nature of a trust or was an ordinary debt depended on the facts and circumstances of each case. He finally held that the deposit in question was not in the nature of a trust and was not entitled to any preference on that ground.

The appellant then went in appeal to a Division Bench. The Division Bench upheld the view taken by the learned Company Judge and dismissed the appeal. The High Court having refused to grant a certificate, the appellant applied for and obtained special leave from this Court, and that is how the matter has come before us.

The two main terms of the agreement, viz., Nos. 8 and 9, between the appellant and the Mills which call for consideration in the present case are these:

"(8) That the firm has deposited sum of Rs.50,000 with the said Mill as a security for the due performance of the contract on their part, on which amount the Mill shall pay interest to the said firm at the rate of 6 per cent per annum.

(9) That the Mill shall refund the said security deposit of Rs.50,000 with interest thereon at the rate on termination of the agency. In case the said amount is not refunded with interest thereon the firm shall be entitled to commission at the

rates mentioned above as if agency has not terminated. In other words as long as security with interest is not refunded and commission due is not paid this agreement will not be terminated."

It may be mentioned that the agreement was for a period of one year which, as already indicated had not expired before the winding-up order was passed on November 8, 1949.

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It will be seen from the terms of the agreement already set out that there was no stipulation that the amount of Rs.50,000 deposited as security would be kept as a separate fund by the Mills and it would not use it for its own purposes. On the other hand, it is clear that interest had to be paid and there was nothing in the agreement to prevent the Mills from using the money as its own so long as it paid interest on it. It is true that the money was to be refunded along with interest on the termination of the agency, but cl. (9) further provided that in case the money was not refunded after one year, the appellant would be entitled to commission as if the agreement had not terminated. As the agreement itself puts it, it will remain alive even after the period of one year so long as the security with interest was not refunded and the commission due was not paid. The last words of cl. (9) of the agreement put the security deposit and the commission due on the same footing. It is because of this provision that the learned Company Judge held that as the security deposit and the commission due were put on the same footing and the commission could only be a debt, the security deposit in the circumstances of this agreement could not be treated on a higher footing. It seems to us that the view taken by the learned Company Judge so far as this agreement is concerned (which was upheld by the Division Bench) is correct.

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We may now refer to the apparent conflict between the Calcutta and Madras High Courts on one side and the Allahabad and Bombay High Courts on the other on this question. The representative cases on one side are: (i) *Re: Alliance Bank of Simla: Peter Donald Macpherson v. Dugald Mckechnie* (1), and (ii) *In the matter of Travancore National and Quilon Bank Limited, Official Liquidators applicant* (2). On the other side the cases are (i) *In re: Manekji Petit Manufacturing Company Limited* (3) and (ii) *Maheshwari Brothers v. Official Liquidators* (4). The two Calcutta and Madras cases seem to take the view that where there is a deposit there is creation of some kind of trust even though the deposit may carry interest and the person with whom the deposit is made is entitled to use the money as his own. It may however be mentioned that the Calcutta case was with respect to provident fund of the employees of a bank which went into liquidation while the Madras case was with respect to security deposit by an employee of a bank for due performance of his duties. It may be added that such cases were later provided for specifically by the amendment of the Indian Companies Act (No. VII of 1913) which was made in 1936 and by which s. 282-B was added to the Companies Act along with cl. (e) in s. 130(1) of the same Act. Even so, these two cases make it clear that the proper approach to the question is to ask whether on the interpretation of the document, if there is one, or from proved or admitted facts and circumstances a trust is established or not. If a trust is established, a provision for payment of interest by the trustee does not destroy the character of the trust nor does the fact that the money is not segregated.

The matter was again considered by the Calcutta High Court in *Kshettra Mohan Das v. D. C. Basu* (5) in connection with a deposit made by a sole selling agent

(1) XXVIII (1923-24) Cal. W.N. 721. (2) A.I.R. (1939) Mad. 387.
(3) A.I.R. (1932) Bom. 311. (4) I.L.R. (1942) All. 242.
(5) I.L.R. (1943) 1 Cal. 313.

and the principle for deciding whether the deposit was in the nature of a trust or a loan was put thus:

"If the security deposit of an employee or an agent of a company in the hands of such company can be regarded as impressed with trust or held in a fiduciary capacity by such company then such employee or agent is entitled to get back the whole of the security deposit even after such company goes to liquidation. . . . In the absence of such trust or fiduciary relation the employee or the agent of the company in liquidation is merely a creditor of the company and must share the assets *pro rata* with other creditors."

There can in our opinion be no disagreement with the principle so enunciated, and the conclusion whether the deposit is in the nature of a trust or a loan will depend upon the facts and circumstances of each case, particularly on the terms of the agreement if there is one in writing. The difficulty however arises in the application of the principle to particular cases. But the Calcutta and Madras High Courts seem to lean to the view that where there is a security deposit it will generally be in the nature of a trust.

This brings us to the cases on the other side. The Bombay High Court in *Manekji Petiti's case* (1) was also considering the case of a deposit by an agent. It considered the terms of the agreement which provided for Rs.6 per cent interest. Ordinarily the company was entitled to use the deposit as it thought fit, but there was a provision in the agreement that in the event of the company raising a loan secured by debentures of the company or by mortgaging company's property, the moneys deposited by the agent were to be forthwith invested in Government securities and to be earmarked in some manner satisfactory to the agent. It was held on the basis of this last clause in the agreement that there could be no trust till the contingency provided therein

(1) A.I.R. (1932) Bom. 311.

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came to pass. In that case that contingency had not come to pass and the moneys were mixed with the moneys of the company and used by it. The Bombay High Court held that up to that stage there was no trust created.

In *Maheshwari Brothers* (1), the question arose whether the security deposited by the agents for the fulfilment of their obligation under the agreement was impressed with trust. The Allahabad High Court considered the agreement and came to the conclusion that as interest was provided and further as the company was entitled to use the deposit as its own and lastly because a floating charge was intended to be created on the assets of the company which failed for want of registration, the deposit was not in the nature of a trust. Thus absence of segregation and presence of interest coupled particularly with a provision for a floating charge which had failed for want of registration inclined the court to hold that the deposit was not in the nature of a trust.

It will thus be seen that the view of the learned Company Judge that the conflict between the Calcutta and Madras High Courts on one side and the Allahabad and Bombay High Courts on the other is more apparent than real is borne out by the fact that in each case the court considered the agreement to decide whether on the terms thereof and facts and circumstances of the case the deposit was impressed with a trust, though it must be admitted that the conclusion reached was not the same.

We are of opinion that the question whether the security deposit in a particular case can be said to be impressed with a trust will have to be decided on the basis of the terms of the agreement and the facts and circumstances of each case, without any leaning one way or the other on the fact that the money was given as a security deposit. If the terms of the agreement, if it is in writing, clearly indicate that the deposit was in the

(1) I.L.R. (1942) All. 242.

nature of a trust, the court will come to that conclusion in spite of the fact that interest is provided for in the agreement. But where the terms of the agreement do not clearly indicate a trust, the court will have to consider the facts and circumstances of each case along with the terms to decide whether in fact something in the nature of a trust was impressed on the security deposit. In such a case the fact whether segregation was provided for or not would be one circumstance to be taken into consideration. Where segregation is provided for, the court would lean towards the deposit being in the nature of a trust. But where segregation is not provided for and the deposit is permitted to be mixed up with the funds of the person with whom the deposit is made, the court may come to the conclusion that anything in the nature of trust was not intended, for generally speaking in view of s. 51 of the Indian Trust Act (No. 2 of 1882) a trustee cannot use or deal with the trust property for his own profit or for any other purpose unconnected with the trust. It is true that where there is a clear trust and the trust deed if any provides that the trustee may use the trust property as he likes, the fact that the trustee can mix the trust property with his own may not make any difference. But where there is no clear indication that a security deposit was impressed with trust, absence of segregation would be a circumstance against there being a trust.

Another circumstance which may have to be taken into account in a case where the agreement does not indicate clearly that the security deposit is impressed with a trust is the payment of interest. Where there is no payment of interest provided for an inference may be readily drawn that the deposit was in the nature of a trust. But where the person with whom the deposit is made is to pay interest it may be possible to infer that payment of interest is a pointer towards there being no trust. Further any other provision in the agreement

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and any other circumstance as to the manner in which the deposit was dealt with may also have to be taken into account in coming to the conclusion whether the security deposit in a particular case was impressed with a trust or not.

We may now refer to some English and American cases in this connection. In *Gee v. Liddell* (1) the facts and circumstances of the case were considered and it was held on those facts and circumstances that there was a trust. In that case £2,000 had been left as trust by a will, but the executor who was the son of the testator said that his father had intended to bequeath £3,000 and the question was whether the further £1,000 was also a trust. On the facts and circumstances of that case it was held that as the amount bequeathed (namely, £2,000) was certainly a trust, the addition of £1,000 to it by the executor would be of the same kind and would be equally impressed with trust. That case also shows that where a trust can be inferred clearly a provision for payment of interest would be immaterial.

In *re: Hallett's Estate, Knatchbull v. Hallett* (2) it was held that if a person held money in a fiduciary character but mixed it up with his own account, the person for whom the money was held could follow it and had a charge on the balance in the bankers' hands. This case again shows that the main question that courts have to decide in such cases is whether on the facts and circumstances a fiduciary relationship is established. If it is established, then the fact that the money was mixed with the trustee's money may not make any difference.

In *re: Hallet & Co.* (3), segregation was the test used for the purpose of deciding whether there was trust or not.

In *Frank M. McKey v. Maurcie Paradise* (4), the question arose with reference to a claim of an employee welfare association against the employer and it was held that

(1) (1866) 55 E.R. 1038.

(3) (1894) 2 Q.B.D. 237.

(2) (1879-80) XIII Ch. D. 696.

(4) 81 Law Edn. 75.

without segregating any money as due to the association there could be no trust. This case shows the significance of segregation in arriving at the inference whether there was a trust.

A consideration of these English and American cases also in our opinion shows that the first question in each case where the court is dealing with a security deposit is to ask whether on the agreement in writing; if any, and on the facts and circumstances of the case and conduct of the parties it can be said that the security deposit was impressed with some kind of a trust. If that can be said then the question whether interest was provided for and whether the trustee could mix the deposit money with his own money would not be of importance and would not take away the character of the deposit being impressed with a trust. The mere fact that money was deposited as a security is not sufficient to come to the conclusion that it must be treated as trust money. The court will have to look to all the terms of the agreement if in writing and to the facts and circumstances of the case and to the conduct of the parties before coming to the conclusion whether a security deposit was impressed with a trust. If a trust can clearly be spelled out from the terms of the agreement that ends the matter. But if the trust cannot be spelled out clearly the fact that there was no segregation provided for and the fact that interest was to be paid would go a long way to show that the deposit was not impressed with the character of a trust particularly where the person with whom the deposit was made could mix it with his own money and could use it for himself. In such a case the inference would be that the relationship between the parties was that of a debtor and creditor. Further besides these circumstances if there is any other term which suggests one kind of relationship rather than the other that will also have to be taken into account. Illustrations of this will be found both in the Bombay case [i.e. in *Manekji's case* (1)] and in the Allahabad case

(1) A.I.R. (1932) Bom. 311.

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[i.e. *Maheshwari Brother's case* (1)]. In the Bombay case besides absence of segregation and presence of interest there was a further fact that in certain circumstances segregation had been provided for. The court was entitled to take that fact into consideration and hold that the deposit was not impressed with trust till segregation took place. In the Allahabad case a floating charge was created which failed for want of registration, and that circumstance was also used to show that the relationship between the parties was that of a debtor and creditor and not that of a trustee and beneficiary.

Let us now apply these principles to the facts of the present case. The facts show that there was no segregation in this case and the Mills could mix the security deposit with its own money and use it for its own purpose. Further because the Mills could use the for its own purpose, it had to pay interest. In addition to these two circumstances which would incline to the view that the relationship was that of a debtor and creditor, there is the further fact that cl. (9) of the agreement provides that even though the period fixed in the agreement comes to an end, the agreement would continue if the security deposit is not refunded and the commission due is not paid. We agree with the learned Company Judge that the last words in cl. (9) make the security deposit and the commission due on a par. The commission due can be nothing other than a debt; the security deposit is put on a par with law. That is a further indication that the relationship in the present case was that of a debtor and creditor. In the circumstances we are of opinion that the High Court was right in its view as to the nature of the security deposit in the present case.

The appeal therefore fails and is hereby dismissed with costs.

Appeal dismissed.

(1) I.L.R. (1942) All. 242.

CIVIL MISCELLANEOUS

Before Mr. M. C. Desai the Chief Justice and
Mr. Justice Lakshmi Prasad*

ALLAHABAD BANK LTD., LUCKNOW

(PETITIONER)

v.

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(OPPOSITE-PARTIES)

The U. P. Encumbered Estates Act, 1934—Ss. 2(a), 7(2) and (3) and S. 50 and Code of Civil Procedure (1908), O. XXI, rr. 58 to 60—S. 2(a) of U. P. E. E. Act—Debt-decree for costs in a suit is a decree for unliquidated damages and is not a debt;—S. 7(3)—Prohibition contained applies to landlord as well as to his heir.

Rules 58 to 60 of O. XXI have to be read together in order to determine the scope of an objection that can be preferred under r. 58.

The two prohibitions envisaged in each of sub-ss. (2) and (3) of s. 7 of the E. E. Act appear to stand at par and cannot be taken to have been enacted to secure the entire property movable or immovable notified under s. 11 for the liquidation of the decree passed under s. 14 undisturbed by any subsequent dealing of the landlord. The particular provision in sub-s. (3), is one for the benefit of a creditor who cannot be deprived of the same simply because the landlord has died and has been succeeded by his heirs.

"Debt incurred after the passing of the order under s. 6" occurring in sub-s. (3) of s. 7 does not mean debt incurred only by the landlord.

The very absence of these words "by the Landlord" in sub-s. (3) and its use in sub-s. (2) serve as a pointer to the fact that the prohibition envisaged by sub-s. (3) regarding attachment in execution of certain decrees is to operate against all decrees which had been passed on the basis of a private debt incurred after the passing of the order under s. 6 no matter whether the debt is incurred by the landlord or by her heirs. The provisions of s. 50 of the act also supports this view.

The decree passed in a suit for specified amount with interest on the allegation that the same specified amount had been paid as sale consideration and became refundable because of the vendor's failure to convey the property for want of title is not a decree for unliquidated damages, while the decree for costs in the said suit is a decree for unliquidated damages within the meaning of "debt" as defined in s. 2(a) of the E. E. Act and as such the decree to the extent of costs is beyond the purview of the prohibition contained in s. 7(3) of the said Act.

Case-law discussed.

* While sitting at Lucknow.

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Civil Miscellaneous Application No. 56 (O. J.) of 1957, Under Article 226 of the Constitution of India.

The facts appear in the judgment.

Shiv Gopal, for the Petitioner.

Standing Counsel, for Opposite-Party No. 1.

R. K. Srivastava and *B. C. Agarwala*, for Opposite-Parties Nos. 3 to 5.

LAKSHMI PRASAD, J.:—This is a petition under Art. 226 of the Constitution. The petitioner is one of the creditors of Rani Manraj Kuer who applied under the U. P. Encumbered Estates Act (hereinafter called the Act) and in which case an order under s. 6 of the Act was passed on 7th April, 1936. The petitioner holds a decree against Rani Manraj Kuer passed by the Special Judge under s. 14 of the Act. Lal Chandra Pratap Singh, impleaded as opposite-party no. 4 who having died is now represented by his heirs, executed a sale-deed in 1939 in favour of Lachman Prasad, impleaded as opposite-party no. 2, who having died is now represented by opposite-parties nos. 2/1 to 2/6 and opposite-party no. 3, under which he received a certain sum as part of the consideration and the balance was left with the purchaser to be paid to certain creditors as specified in the deed. This transaction did not fructify as subsequently Lal Chandra Pratap Singh was found to have no title to the property he conveyed thereunder. In the circumstances, Lachman Prasad and Madan Lal filed a suit against Lal Chandra Pratap Singh for the refund of the sale consideration they had paid and for interest claimed as damages. This suit resulted in a decree on 26th July, 1946, in favour of Lachman Prasad and Madan Lal for Rs.13,786-8-3 with *pendente lite* and future interest at the rate of Rs.3 per cent per year with proportionate costs amounting to Rs.1,255-13. Liquidation proceedings under the provisions of the Encumbered Estates

Act in the case arising out of the application moved by Rani Manraj Kuer in 1936 are still pending before the Collector. In other words no declaration as envisaged by section 44 of the Act has been so far made. On the death of Rani Manraj Kuer she came to be substituted in the Encumbered Estates Act case by an order dated 14th July, 1942, by the aforesaid Lal Chandra Pratap Singh and opposite-party no. 5 Lal Bhanu Pratap Singh. In execution of their aforesaid decree passed against Lal Chandra Pratap Singh on 26th July, 1946, Lachman Prasad and Madan Lal applied for attachment of the zamindari abolition compensation bonds issued in respect of the zamindari property of Rani Manraj Kuer notified under section 11 of the Act. Civil Judge, Bara Banki, opposite-party no. 1, allowed the said application and attached the said bonds of the face value of Rs.15,850. The petitioner, namely Allahabad Bank Limited, Lucknow, pleads that in view of the provisions of sub-s. (3) of s. 7 of the Act the said attachment effected by opposite-party no. 1 is illegal and without jurisdiction. Accordingly the prayer in the petition is that opposite-party no. 1 be directed to cancel the attachment and to return the bonds to the Compensation Officer, Tahsil Haidergarh, district Bara Banki, and opposite-parties nos. 2/1 to 2/6 and 3 be directed to withdraw their applications for realisation of their aforesaid decree by attachment and sale of the compensation bonds.

The petition is opposed by opposite parties nos. 2/1 to 2/6 and 3. Learned counsel appearing for the opposite-parties has raised three contentions. The first contention is that the petition ought to fail because the petitioner has not availed of the alternative remedy open to the petitioner either under O. XXI, r. 58, C. P. C. or under s. 47, C. P. C. The next contention is that the provision contained in s. 7(3) of the Act is for the benefit of the landlord applicant and accordingly it cannot be extended to the heirs of the landlord

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after the landlord's death. It is further argued in this connection that the prohibition against attachment in execution of a decree passed on the basis of a private debt incurred subsequent to the date of the order passed under s. 6, as contained in s. 7(3), relates to only those decrees which are passed on the basis of a private debt incurred by the landlord applicant and cannot be applied to the execution of a decree passed on the basis of a private debt incurred by another person even though it may be that on the death of the landlord that other person happens to succeed the landlord. His last contention is that the decree sought to be executed in the instant case is not a decree on the basis of a private debt within the meaning of that term as defined in s. 2(a) of the Act.

Having given my best consideration to the points urged by the learned counsel for the opposite-parties I have come to the conclusion that his first contention, as mentioned above, is without any substance whatsoever. Rr. 58 to 60 of O. XXI have to be read together in order to determine the scope of an objection that can be preferred under r. 58. A plain reading of the aforesaid rr. 58 to 60 would at once show that the ground on which the petitioner objects to the attachment in the instant case is by no means within the ambit of an objection that can be preferred under r. 58. The petitioner being only one of the many creditors, who hold decrees under s. 14 of the Act, has obviously no interest in the property of the landlord applicant which at the moment of the impugned attachment was held by the heirs of the landlord as a result of the landlord's death. It is nobody's case that the property under attachment is not owned or possessed by those against whom attachment has been ordered by opposite-party no. 1. As shall appear from r. 60, release from attachment can be ordered only if the Court is satisfied that the attached property was not, when attached, in the possession of the

judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, and so on. It is thus obvious that on the facts, with which we are concerned in the instant case, no objection under O. XXI r. 58 could ever be preferred. The suggestion with regard to an objection being filed under s. 47, C. P. C. is no better. The very opening words of s. 47(1) indicate that only questions arising between the parties to the suit in which the decree is passed can be determined by an objection thereunder provided the same relate to the execution, discharge or satisfaction of the decree. Here we are concerned with the execution of a decree passed in favour of Lachman Prasad and Madan Lal against Lal Chandra Pratap Singh. By no stretch of imagination the petitioner can be said to be a party to the suit in which the particular decree came to be passed. Hence the petitioner would have no *locus standi* whatsoever to file an objection under s. 47, C. P. C. I have, therefore, no hesitation in rejecting the contention of the learned counsel.

S. 7 of the Act provides for the consequences which are to ensue on the passing of an order under s. 6. Its sub-s. (1) has two clauses. Cl. (a) provides for the stay of all pending proceedings in respect of any public or private debt to which the landlord is subject at the time an order under s. 6 is passed. Cl. (b) prohibits the institution of any fresh suit or proceeding in respect of any debt incurred before the passing of the order under s. 6. Then we have sub-ss. (2) and (3). Sub-s. (2) confines itself to the property other than proprietary rights in land whereas sub-s. (3) confines itself to the proprietary rights in the land. But in either case the property must

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be one which has been notified under s. 11. According to sub-s. (2) since after the passing of the order under s. 6 till the happening of any one of the several contingencies mentioned therein no decree obtained on the basis of any private debt incurred by the landlord after the passing of the order shall be executed against any property of the landlord, other than proprietary rights in land, which has been notified under s. 11, and it is further provided that the landlord shall not be competent without the sanction of the Collector to make an exchange of or gift of, or to sell, mortgage or lease any of that property. A similar provision appears in sub-s. (3) in respect of landlord's proprietary rights in land with the difference that the words "by the landlord" as they appear in sub-s. (2) in between the words "on the basis of any private debt" and "after the passing of the order under s. 6" do not appear in sub-s. (3). The material clause in sub-s. (3) runs as below:

" no decree obtained on the basis of any private debt incurred after the passing of the order under s. 6 shall be executed against any of the landlord's proprietary rights in the land mentioned in the notice published under s. 11 "

Having given my best consideration to the aforesaid provisions contained in the three sub-sections of s. 7 I have come to the conclusion that the contention of the learned counsel that the prohibition contained in sub-ss. (2) and (3) regarding certain property being seized in execution of decrees passed on debts incurred after the passing of an order under s. 6 being a provision for the benefit of a landlord cannot be availed of by his heirs, is without any substance. As I read s. 7 I find that though the provisions in sub-s. (1) thereof are for the benefit of the landlord those in sub-ss. (2) and (3) thereof appear to have been enacted to achieve some security to the creditors at whose costs certain benefit has been conferred on the landlord by virtue of the provisions of sub-s.

(1). There can be little doubt that the provisions in sub-ss. (2) and (3), prohibiting voluntary alienation by the landlord, amount to a disability cast on the landlord and to that extent they are obviously designed to secure the properties notified under s. 11 for the liquidation of the debts for which decrees have been passed under s. 14. In my view just as these provisions are calculated to prohibit a voluntary alienation, the others, which prohibit seizing of the property in execution, are calculated to prevent involuntary alienations. After all what is the basis of a decree-holder's right to have the property of the judgment-debtor attached and sold in execution of a money decree. In my view it is nothing but the enforcement of the personal covenant of the debtor which he stipulates with the creditor at the time he incurs debt. It shall thus be seen that while in one case the landlord straightaway alienates the property by his own act, in the other case he enters into a personal covenant entitling the creditor to have his property attached and sold through the agency of a Court in the enforcement of that personal covenant. Judged in this background the two prohibitions envisaged in each of sub-ss. (2) and (3) appear to stand at par and cannot but be taken to have been enacted to secure the entire property movable or immovable notified under s. 11 for the liquidation of the decrees passed under s. 14 undisturbed by any subsequent dealing of the landlord. I have thus no manner of doubt that the particular provision in sub-s. (3), with which we are concerned in the instant case, is one for the benefit of a creditor who cannot be deprived of the same simply because the landlord has died and has been succeeded by his heirs. The view I have taken appears to get support from the following observations made in the case of *Tulsipat Ram v. Jagat Narain Mathur* (1):

“Under the scheme of the Encumbered Estates Act the debtor's proprietary rights in land as well

(1) 1949 A.W.R. 523 at pp. 525, 526.

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as other property is made available to the Collector for liquidation of the debts, and after the passing of the order under s. 6 the landlord is not competent to create any interest in derogation of the creditor's rights . . . The bar against proprietary rights in land, however, continues till the Collector has declared, in accordance with s. 44, that the landlord has ceased to be subject to the disabilities imposed on him by sub-s. (3) of s. 7, because the law desires to leave the powers of the liquidating Court unfettered in respect of his properties notified under s. 11 till the close of all proceedings under the Act." If the prohibition contained in sub-s. (3) against the attachment of landlord's proprietary interest in land in execution of a decree on the basis of a private debt incurred after the passing of the order under s. 6 is for the benefit of the creditors and is taken to attach to the property of the landlord, then obviously it must continue to operate even after the death of the landlord so long as the liquidation under the Act has not been completed. There appears little justification for the contention that "debt incurred after the passing of the order under section 6" occurring in sub-s. (3) must be taken to refer to a debt incurred by the landlord. It would be doing violence to the language of sub-s. (3) by reading the words "by the landlord" in between the words "on the basis of any private debt" and "after the passing of the order under s. 6", particularly when the Legislature uses those words "by the landlord" in sub-s. (2) and omits to use them in sub-s. (3). There is no warrant to think that this omission is accidental. On the other hand the Court would be fully justified to hold that this omission is deliberate. The very absence of these words "by the landlord" in sub-s. (3) serves as a pointer to the fact that the prohibition envisaged by sub-s. (3) regarding attachment in execution of certain decrees is to operate against all decrees which had been passed on the basis of a private debt incurred after the

passing of the order under s. 6 no matter by whom the debt has been incurred. In the case of *Kashi Prasad v. Padamjit Singh* (1), a Division Bench of this Court held that s. (3) absolutely bars the execution of a decree passed on the basis of a private debt incurred after the passing of the order under s. 6 against the landlord's proprietary interest in land notified under s. 11. The facts of that case are very much analogous to those of the present case with the only difference that the decree sought to be executed in that case was passed on the basis of a private debt incurred by the landlord himself whereas in the instant case the decree has been passed on the basis of a private debt incurred by the heir of the landlord. It may, however, be noted that in the case of *Kashi Prasad* (1) also the dispute had arisen after the death of the landlord when the properties were in the ownership of his heirs. As contended by the learned counsel for the petitioner the provisions of s. 50 of the Act appear to support the conclusion I have reached on the interpretation of s. 7 itself. The provision in s. 50, that even subsequent to the death of the landlord the proceedings are to be continued as nearly as may be possible in all respects as if the landlord were still living, would certainly stand defeated if the view to be taken were that the disability attached to the landlord's power of voluntary alienation under s. 7(3) was not to attach to the landlord's heirs on the death of the landlord. It is true that there appears a specific provision in cl. (b) of s. 50 for the continuance of certain disabilities imposed by sub-s. (2) of s. 7 even subsequent to the death of the landlord and there is no such specific provision for the continuance of disability imposed by sub-s. (3) of s. 7. But in my view this specific provision in cl. (b) of s. 50 appears to have been made to make the position doubly sure, presumably because we have the words "by the landlord" in sub-s. (2) in between

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(1) (1952) Revenue Decision (H.C.) 38.

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the words "on the basis of any private debt incurred" and "after the passing of the order under s. 6". To infer from the absence of a provision similar to that found in cl. (b) of s. 50 for the continuance of disabilities imposed by sub-s. (3) of s. 7, that the disabilities imposed by sub-s. (3) are not to continue after the death of the landlord, would be running counter to the plain language of sub-s. (3) itself. I am accordingly of opinion that in execution of the decree passed in favour of Lachman Prasad and Madan Lal, if it is found to have been passed on the basis of a private debt, the compensation bonds cannot be attached and sold because of the prohibition contained in s. 7(3), since it is not in dispute that these bonds are in respect of the landlord's proprietary interest in land notified under s. 11 of the Act.

Lastly, I come to the question whether or not the decree in question has been obtained on the basis of a private debt. The term "debt" as defined in s. 2(a) includes any pecuniary liability except liability for unliquidated damages. Having regard to the facts of the case, as enumerated above, which are not in dispute, the contention that the decree is for unliquidated damages cannot be accepted even for a moment. Admittedly, the suit was filed for a specified amount on the allegation that the same had been paid as sale consideration and became refundable because of the vendor's failure to convey the property for want of title. That being so, this claim for refund by no means can be said to be one for unliquidated damages. Learned counsel then argued that at any rate that part of the decree which is for interest and costs must be taken to be for unliquidated damages. It is difficult to see as to how the decree for interest, that has been actually granted in the case, can be taken to be one for unliquidated damages. It may be that Lachman Prasad and Madan Lal claimed interest at a higher rate and the Court

allowed it at a lower rate. That by itself would not make the claim for interest as one for unliquidated damages. Nor would it become a claim for unliquidated damages merely because interest was claimed by way of damages. So long as there is a claim for a sum certain there arises no question of treating it as one for unliquidated damages. In Halsbury's Laws of England, Vol. 10, 2nd Edition, page 85 it is said:

"Damages are termed unliquidated when they have not been assessed before hand by the parties or some statute, in which case the jury are at liberty, subject to the rules governing the measure of damages to award such damages as they think fit."

I have thus no hesitation in rejecting the contention that the decree for the refund of the sale consideration or for interest passed in favour of Lachman Prasad and Madan Lal against Lal Chandra Pratap Singh is one for unliquidated damages.

In support of his contention that the decree for costs is a decree passed on the basis of unliquidated damages learned counsel places reliance on the case of *Hari Saran Das v. Har Kishan Das* (1). The proposition that a decree for costs is a decree passed on the basis of unliquidated damages appears to have been upheld also in the case of *Rani Suraj Kunwar v. Deputy Commissioner, Hardoi* (2). In the circumstances, I accept the contention of the learned counsel that the decree to the extent of Rs.1,255-13-0, which is the amount of costs, is beyond the purview of the prohibition contained in s. 7(3).

In the end, I would allow the petition in part and quash the impugned attachment except in respect of a portion of the decree amounting to Rs.1,255-13-0 which is for costs. In the circumstances, I would direct parties to bear their own costs.

DESAI, C. J.:—I agree.

Ordered accordingly.

(1) 1941 Oudh Weekly Notes 108. (2) A.I.R. 1945 Oudh 17.

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CRIMINAL REVISION

*Before Mr. Justice G. D. Sahgal and Mr. Justice
R. Chandra**

DR. KRISHNA NAND GUPTA (APPLICANT)

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March, 1

v.

THE STATE OF U. P., THROUGH DEPUTY REGISTRAR,
HIGH COURT OF JUDICATURE AT ALLAHABAD,
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Code of Criminal Procedure, (1898), Ss. 476 and 479-A—I. P. C. 1860, Ss. 193, 218, 466 and 471—Offences punishable under ss. 193 and 218 Indian Penal Code—Offences covered by s. 479-A, Criminal Procedure Code—Ss. 476 to 479, Criminal Procedure Code do not apply—S. 476, Criminal Procedure Code applies to offences under ss. 466 and 471.

In relation to the prosecution of any person appearing before a Court as a witness for giving false evidence or fabricating false evidence, s. 479-A engrafts an exception to s. 476, Criminal Procedure Code. Sub-s. (6) of s. 479-A makes it clear that the provisions of that section alone are applicable and not the provisions of ss. 476 to 479 for the prosecution of a witness who has given or fabricated false evidence. When no action for offences punishable under s. 193 and s. 218, I. P. C. has been taken in accordance with the provisions of s. 479-A of the Code it is not open to have recourse to the provisions of s. 476 of the Code, to do so would be to go against the provisions of sub-s. (6) of s. 479-A. The provision of s. 476 of the Code are still available against witnesses whose cases cannot be brought under s. 479-A.

The act of intentionally giving false evidence in any stage of judicial proceeding and the act of fabricating false evidence for the purpose of being used in any stage of a judicial proceeding, fall exclusively within the purview of s. 479-A of the Criminal Procedure Code.

For offences under s. 471, I. P. C. action could certainly be taken under s. 476, Criminal Procedure Code as that offence has been specifically mentioned in s. 195(1)(c), Criminal Procedure Code. Section 195 (i)(c), Criminal Procedure Code also includes any offence described in s. 463 of the Indian Penal Code. It falls under Chap. XXIII, which refers to offences relating to documents etc., s. 463 defines forgery. S. 466 prescribes punishment for forgery of record of Court or of the public register etc. Hence a complaint on charges under s. 466 and s. 471, I. P. C. could be filed under s. 476 of the Criminal Procedure Code.

*While sitting at Lucknow.

These offences are not covered by sub-s. (1) of s. 479-A of the Criminal Procedure Code.

The three essentials of the offence under s. 218 enumerated.
Case-law discussed.

Criminal Revision No. 295 of 1963 against the order dated 17th August, 1963 passed by S. Malik, Sessions Judge, Lucknow, in Criminal Revision No. 127 of 1963.

Shanker Sahai Saksena and *R. B. Bisaria*, for the applicant.

K. N. Kapoor, for the State.

The following judgment of the court was delivered by—

R. CHANDRA, J.:—In Criminal Appeal No. 355 of 1962 (*Mohammad Sami v. State*) and Capital Sentence Reference No. 25 of 1962 (*State v. Mohammad Sami*), under the orders of Hon'ble NIGAM and MISRA, JJ. a complaint under ss. 471, 466, 195 and 218 of the Indian Penal Code, was filed against Dr. K. N. Gupta. When the complaint came up for hearing before the Magistrate, an objection was raised on behalf of the petitioner, that in view of the recent pronouncement of the Supreme Court in the case of *Shabir Husain v. State of Maharashtra* (1), a complaint for the offences of giving false evidence and fabricating false evidence could be made only in accordance with the provisions of s. 479-A of the Criminal Procedure Code and since the complaint in the instant case had been filed under s. 475, Criminal Procedure Code, the entire proceeding became null and void and the Magistrate had no power to proceed with the case. The Magistrate dismissed the objection. Being aggrieved with that order, Dr. K. N. Gupta went up in revision to the Sessions Judge, Lucknow. He also summarily dismissed the revision. Against that order, he filed the present

(1) A.I.R. 1963 Supreme Court 816.

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revision in the High Court. The revision came up for hearing before our brother LAKSHMI PRASAD, and he referred it to a larger Bench, as some important questions of law were involved. We have heard the learned counsel for the parties at length.

The primary question for consideration in the present revision is, whether the complaint for the offences under ss. 471, 466, 195 and 218 of the Indian Penal Code, could be filed under s. 476 or 479-A of the Criminal Procedure Code. The contention on behalf of the petitioner is, that the complaint should have been filed strictly according to the provisions of s. 479-A of the Criminal Procedure Code, and since mandatory provisions of law have not been complied with, the entire proceedings became null and void, and no action could legally be taken on the complaint filed in the Court.

Dealing with the evidence of Dr. K. N. Gupta, the Hon'ble Judges made the following observations:

"P. W. 1, Dr. K. N. Gupta examined Mohammad Sami's injuries in the jail. According to him, there were three injuries:

(1) Sloughing irregular lacerated wound $\frac{1}{4}'' \times 1'' \times \frac{1}{2}''$ on the back of first inter phalangeal joint of the right ring finger.

(2) Incised wound $2'' \times 1/10'' \times$ skin deep on the palm of the left hand transversely.

(3) Complained of pain on the back of neck and left lower chest and right buttock with no mark of injury.

The prosecution have seriously challenged the genuineness of injury no. 2. This injury is not mentioned either in general diary report Ext. Ka-21 or even in the Jail Gate Register as is deposed by C. W. 1 Raghubir Prasad. The learned

Sessions Judge had certain comments to make against the evidence of Dr. K. N. Gupta and also the record prepared by him. In order to be more certain in the formulation of our view, we summoned Dr. K. N. Gupta and have examined him under the provisions of s. 438 read with 374 of the Code of Criminal Procedure. We are of opinion that his statement is absolutely unworthy of belief. We do not want to express ourselves further as we might take certain further proceedings against him. The evidence, however, clearly indicates that pages 13, 14, 15 and 16 of the Jail Injury Register have been torn . . . In the circumstances we are of opinion that Dr. K. N. Gupta is a completely unreliable witness. His evidence cannot be attached the least weight. We are, therefore, of opinion that the existence of the incised wound on the palm of the left hand of Mohammad Sami is not proved. We would go further and hold that this injury never existed and has been got added to the injury report only in order to make out a case of self-defence . . .

Before we part with the case, we would like to mention that we are not satisfied with the statement made by Dr. K. N. Gupta in this case either in the court below or before us. We are of opinion that it is expedient in the interest of justice that an enquiry under s. 476, Cr. P. C. should be made against him into offences referred to in s. 195, sub-s. (1) cls. (b) and (c) of the Code of Criminal Procedure, i.e. offences punishable under ss. 195 and 471 in addition to offences punishable under ss. 218 and 466 of the Indian Penal Code. As we would have to consider preferring a complaint, we would like to give an opportunity even in respect of two sections not covered by the provisions of

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s. 475 of the Code of Criminal Procedure to Dr. K. N. Gupta. We, therefore, direct that a separate proceeding be started and notice given to Dr. K. N. Gupta to show cause . . ."

(Vide order dated 31st July, 1962, at page 40 of the paper book).

In pursuance of this order, a notice was issued to Dr. Gupta to appear in person in Court on 31st August, 1962 at 10.15 a.m. to show cause why a complaint under ss. 123 and 471 and 466 and 218 of the Indian Penal Code read with ss. 476 and 195, Cr. P. C., be not filed against him (vide notice dated 31st July, 62). On 1st October, 1962, Dr. K. N. Gupta filed an application and offered an unconditional apology, and threw himself at the mercy of the Court (vide pages 40 and 42 of the paper book), after giving a hearing to the petitioner, the Hon'ble Judges ordered that a complaint be filed on the charges under ss. 471, 466, 193 and 218, I. P. C., (vide order dated the 3rd February, 1963 at page 47 of the paper book). Accordingly, the complaint was filed on 28th February, 1963, and that has given rise to the present revision.

It clearly follows, that the complaint was made by the High Court under s. 476(1) of the Cr. P. C., s. 476(1) runs thus:

"When any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in s. 195, sub-s. (1), cl. (b) or cl. (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing

signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction. . . .

Provided that, where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint. . . ."

Similarly, s. 195(1)(b) and (c) of the Cr. P. C., lays down:

"No Court shall take cognizance

(b) of any offence punishable under any of the following sections of the same Code, namely, ss. 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate; or

(c) of any offence described in section 465 or punishable under s. 471, s. 475 or s. 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate. . . ."

S. 479-A, which has been added by Act XXVI of 1965, provides:

"(1) Notwithstanding anything contained in ss. 476 to 479 inclusive, when any Civil, Revenue or Criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial pro-

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ceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding, and that, for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reasons therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing signed by the presiding officer of the Court setting forth the evidence which, in the opinion of the Court, is false or fabricated and forward the same to a Magistrate of the first class having jurisdiction. . . .

Provided that where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint. . . .

(5) In any case, where an appeal has been preferred from any decision of a Civil, Revenue or Criminal Court but no complaint has been made under sub-s. (1), the power conferred on such Civil, Revenue or Criminal Court under the said subsection may be exercised by the Appellate Court; and where the Appellate Court makes such complaint, the provisions of sub-s. (1) shall apply accordingly, but no such order shall be made, without giving the person affected thereby an opportunity of being heard.

(6) No proceedings shall be taken under ss. 476 to 479 inclusive for the prosecution of a person for giving or fabricating false evidence, if in respect of

such a person proceedings may be taken under this section."

Ss. 476 to 479 relate to offences referred to in s. 195, sub-s. (1), cl. (b) and (c). Among the offences referred to in cl. (b) of s. 195(1) are the offences of giving or fabricating false evidence. S. 479-A relates to offences of giving or fabricating false evidence in a judicial proceeding by a witness. Sub-s. (6) of s. 479-A, as would appear, creates a bar against any proceeding being taken under ss. 476 to 479 for prosecuting a person for giving or fabricating false evidence, if such proceeding can be taken under s. 479-A. It would, therefore, appear that the provisions of s. 479-A override the provisions of ss. 476 to 479 in so far as they relate to the giving of false evidence or fabricating false evidence by a person who gives evidence during the course of the judicial proceedings. When no action has been taken against him in accordance with the provisions of s. 479-A of the Code it is not open to have recourse to the provisions of s. 476 of the Code; to do so, would be to go against the provisions of sub-s. (6) of s. 479-A. But s. 479-A, Cr. P. C. has not impliedly repealed s. 476 of the Code in respect of all cases of witnesses giving or fabricating false evidence in judicial proceedings. The provisions of s. 476 of the Code are still available against witnesses whose cases cannot be brought under s. 479-A for one reason or another. S. 479-A applies where the Court acts *suo motu* at the time of declaring its judgment and records a finding that a person appearing before it as a witness had intentionally given false evidence or had intentionally fabricated false evidence. Under s. 476 the Court can act on an application made to it in this behalf or even *suo motu*. The test in every case was to be whether proceedings could have been taken under s. 479-A and it was only in those cases where this question was to be answered in the affirmative that the old

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law became inoperative. In all other cases it could be used just as it was being used before the enactment of s. 479-A. In relation to the prosecution of any person appearing before a Court as a witness for giving false evidence or fabricating false evidence, section 479-A engrafts an exception to s. 475, Cr. P. C. Sub-s. (6) of s. 479-A makes it clear that the provisions of that section alone are applicable and not the provisions of ss. 476 to 479 for the prosecution of a witness who has given or fabricated false evidence.

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S. 479-A only applies to a case where a witness has intentionally given false evidence in any stage of a judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of a judicial proceeding. The language used is exactly similar to the language used in s. 193 of the Indian Penal Code and it is obvious therefore that s. 479-A of the Code of Criminal Procedure, applies to a case where an offence is alleged to have been committed under s. 193 of the Indian Penal Code. The combined effect of sub-ss. (1) and (3) is to require the Court intending to make a complaint, to record a finding that in its opinion a person appearing as a witness has intentionally given false evidence and that for the eradication of the evils of perjury and in the interests of justice, it is expedient that such witness should be prosecuted for the offence and to give the witness proposed to be proceeded against, an opportunity of being heard as to whether a complaint should be made or not. The finding must be not only that the witness has given or fabricated false evidence, but also that, for eradication of evils of perjury and fabrication of false evidence it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him.

It thus follows that the special procedure prescribed under s. 479-A is only for the prosecution of a

witness for the act of giving false evidence in any stage of a judicial proceeding or for fabricating of false evidence for the purpose of being used in any stage of a judicial proceeding. Such acts have been made punishable under section 193 and cognate sections in Chap. XI of the Indian Penal Code. Chap. XI of the Indian Penal Code relates to 'false evidence and offences against public justice'. S. 193 of the Indian Penal Code, which falls under that chapter, lays down:

"Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished. . . ."

S. 192 of the Act defines 'fabricating false evidence'. It runs thus:

"Whoever causes any circumstances to exist or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said 'to fabricate false evidence'."

It thus becomes abundantly clear that the act of intentionally giving false evidence in any stage of judicial proceeding and the act of fabricating false evidence for the purpose of being used in any stage of a judicial proceeding, fall exclusively within the purview of s. 479-A of the Criminal Procedure Code.

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In a decision of the Supreme Court in *Dr. B. K. Pal Chaudhry v. State of Assam* (1), it was held:

"In a case governed by sub-s. (5) of s. 479-A the terms of both sub-ss. (1) and (5) have to be complied with. The combined effect of these sub-sections is to require the court intending to make a complaint, to record a finding that in its opinion a person appearing as a witness has intentionally given false evidence and that for the eradication of the evils of perjury and in the interests of justice, it is expedient that such witness should be prosecuted for the offence and to give the witness proposed to be proceeded against, an opportunity of being heard as to whether a complaint should be made or not.

Where therefore in the order passed by the High Court directing complaint to be filed against a witness there was no finding recorded by it that the witness had intentionally given any false evidence or that it was expedient to proceed against him for the eradication of the evils of perjury and in the interests of justice, and further, the High Court did not give the witness a proper hearing to which he was clearly entitled under the terms of sub-s. (5) of s. 479-A; the order was made in breach of the express provisions of the section and could not be allowed to stand. The finding required to be made by s. 479-A (1) was only of a *prima facie* nature and that it could not be a finding which would have any force at the trial upon the complaint made pursuant to that finding."

In another case, *Babu Lal v. State of Uttar Pradesh* (2), it was held:

"It is clear from the terms of sub-s. (6) of s. 479-A that the procedure prescribed thereby alone applies if the case falls within sub-s. (1) of that section.

(1) A.I.R. 1960 S.C. 183.

(2) A.I.R. 1964 (S.C.) 725.

But sub-s. (1) has a limited operation; it applies only to the prosecution of a witness appearing before the Court who has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding. The sub-section may therefore be resorted to only in a case which falls within the first paragraph of s. 193 of the Indian Penal Code. and allied ss. 194 and 195 when it is committed by a witness appearing before the Court. The phraseology used in s. 479-A is plain and unambiguous; it excludes the jurisdiction of the Court to proceed under ss. 476 to 479, in respect of offences specified in s. 195(1)(b) and (c) of the Code of Criminal Procedure only where a person appearing before the Court as a witness has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding."

Similar view was expressed in the case of *Raghubir Prosad Dudhwala v. Chamanlal Mehra* (1). It was held:

"The special procedure of s. 479-A is prescribed only for the prosecution of a witness for the act of giving false evidence in any stage of judicial proceedings or for fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding. There is nothing in the section which precludes the application of any other procedure prescribed by the Code in respect of other offences. In applying the principle that a special provision prevails over a general provision, the scope of the special provision must be strictly construed in order

(1) 1964 A.W.R. (S.C.) 485.

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to find out how much of the field covered by the general provision is also covered by the special provision. Examining the special procedure prescribed by s. 479-A in that light, it is important to notice that the act of intentionally giving false evidence in any stage of judicial proceeding and the act of fabricating false evidence for the purpose of being used in any stage of a judicial proceeding mentioned in s. 479-A of the Criminal Procedure Code are the acts which are made punishable under s. 193 of the Indian Penal Code and cognate sections in Chap. XI.

It appears clear to us therefore that it is prosecution in respect of s. 193 of the Indian Penal Code and cognate sections in Chap. XI that is dealt with under section 479-A. If the Legislature had intended that the special procedure would apply to offences other than offences under s. 193 of the Indian Penal Code and cognate sections in Chap. XI it would have used clear words to that effect. . . ."

S. 218 also falls under Chap. XI of the Indian Penal Code. The essentials of the offence under this section are:

- (1) The offender must be a public servant charged with the preparation of a record or writing.
- (2) He must have framed that record or writing incorrectly.
- (3) He must have done so with intent to cause or knowing it to be likely that he will thereby—
 - (a) cause loss or injury to the public or any person, or
 - (b) save any person from legal punishment, or
 - (c) save any property from forfeiture or other charge to which it is legally liable.

From the observations made by the Hon'ble Judges against the evidence of Dr. Gupta, it is clear that he made a false record of the injuries with the object of helping the accused in his defence, at the trial. So, this offence would also be fully covered under s. 479-A of the Code of Criminal Procedure. This section finds no place under s. 195(1)(b) of the Code of Criminal Procedure. So, the provisions of s. 476, Code of Criminal Procedure, are inapplicable to it. It was urged that s. 479-A (6) creates bar only against proceeding being taken under ss. 476 to 479 of the Code of Criminal Procedure if such proceeding could be taken under s. 479-A and as proceedings under s. 218 of the Indian Penal Code are not included in s. 476 read with s. 195(1)(b) or (c), there was no bar to a complaint being filed under section 218 of the Indian Penal Code apart from the provisions of s. 476 of the Code of Criminal Procedure. This argument it is difficult to accept. S. 479-A of the Code of Criminal Procedure provides as to how the Court is to proceed in case of prosecuting a person for intentionally fabricating false evidence for the purpose of being used in any stage of a judicial proceeding and if it provides a certain manner of doing so then it is only in that manner that action can be taken for prosecuting a person for intentionally giving false evidence or intentionally fabricating false evidence for the purpose of being used in any stage of judicial proceeding. This is in consonance with the principle laid down in *Nazir Ahmad v. King-Emperor* (1), wherein it has been pointed out that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Keeping this rule in view even for the prosecution for an offence under s. 218 of the Indian Penal Code the complaint could not be filed by the Bench apart from the way prescribed under s. 479-A of the Code of Criminal Procedure. Thus the complaint both for the offences under ss. 193 and 218 of the Indian

(1) A.I.R. 1936 P.C. 233.

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Penal Code should have been strictly in accordance with the requirement of s. 479-A of the Code of Criminal Procedure. Since the Hon'ble Judges did not take action under s. 479-A they also did not record a clear finding that the witness had intentionally given or fabricated false evidence, and it was expedient to proceed against him for the eradication of evils of perjury. So for non-compliance with the mandatory provisions of law, the order for filing the complaint on the charges under ss. 193 and 218 of the I. P. C. could not be maintained. Complaint on those charges should have been filed, after strictly observing the special procedure prescribed under s. 479-A of the Cr. P. C. As regards the offences under ss. 471 and 466, I. P. C., they do not clearly fall within the purview of s. 479-A of the Criminal Procedure Code. S. 195(1)(c) of the Criminal Procedure Code mentions:

"of any offence described in section 463 or punishable under s. 471, s. 475 or s. 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding. . . ."

S. 471 of the Indian Penal Code, has been specially mentioned in the above sub-section. So, for that offence action could certainly be taken under s. 476 of the Criminal Procedure Code. The sub-section referred to above, also includes 'any offence described in s. 463 of the Indian Penal Code'. It falls under Chap. XVIII, which refers to 'offences relating to documents etc. 'S. 463 defines forgery'. It lays down:

"Whoever makes any false document or part of a document with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract,

or with intent to commit fraud or that fraud may be committed or commits forgery."

S. 466 prescribes punishment for forgery of record of Court or of public register, etc. The essentials of the offence are:

(1) That the accused forged the document.

(2) That the document forged is one of the kinds specified in the section.

So, a complaint on the charges under ss. 466 and 471 of the Indian Penal Code, could be filed under s. 476 of the Cr. P. C. These offences are not covered by sub-s. (1) of s. 479-A of the Criminal Procedure Code.

In *Raghubir Prosad Dudhwala v. Chamanlal Mehra* (1), it was held:

"We are therefore of opinion that s. 479-A has no application to prosecution for offences other than an offence under s. 193 and cognate sections in Chap. XI and that as regards other offences ss. 476, 477, 478 and 479 continue to apply even after the enactment of s. 479-A."

The same view was expressed in *Babu Lal v. State of Uttar Pradesh* (2). It was held:

"An offence punishable under s. 471, Indian Penal Code being one of fraudulently or dishonestly using as genuine any document which the accused knows or has reason to believe to be a forged document, does not fall within the category contemplated by s. 479 (1) of the Code of Criminal Procedure and therefore the authority of the Court to act under s. 476 of the Code is not impaired by sub-s. (6) of s. 479-A. . . . The offences of forgery and of fabricating false evidence for the purpose of using it in a judicial proceeding are therefore distinct, and within the description of fabricating false

(1) 1964 A.W.R. S.C. 486.

(2) A.I.R. 1964 S.C. 725.

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LUCKNOWR. Chandra.
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evidence for the purpose specified in s. 479-A, Criminal Procedure Code, the offence of forgery is not included. In any event the offence penalised under s. 471, I. P. C. can never be covered by sub-s. (1) of s. 479-A. Therefore for taking proceeding against a person who is found fraudulently in any judicial proceeding, resort may only be had to s. 476, Code of Criminal Procedure."

We may point out in the following observation made by this Court in dealing with the true interpretation of s. 479-A, Code of Criminal Procedure in *Sabir Husqin Bholu v. State of Maharashtra* (1):

"From this it would follow that whereas s. 475 is general provision dealing with the procedure to be followed in respect of a variety of offence affecting the administration of justice, in so far as certain offences falling under ss. 193 to 195 and s. 471, I. P. C. are concerned the Court before which that person has appeared as a witness and which disposed of the case can alone make a complaint."

The words 'and s. 471' appear to have crept in by oversight. That is clear from the observation made by the Court earlier in the judgment, that the discussion relating to the exclusive operation of s. 479-A of the Code of Criminal Procedure was restricted to the offence of intentionally giving false evidence in any stage of judicial proceeding.

For the reasons already given, we are of opinion that the complaint for the offences under ss. 466 and 471 of the Indian Penal Code, under the provisions of s. 476, Cr. P. C., is perfectly in order. Since the case is already pending in Court, we have deliberately refrained from expressing any opinion on the merits of the charges.

(1) A.I.R. 1963 S.C. 816 at p. 830.

Accordingly, the revision is partly allowed and the orders of the Courts below are modified to this extent that the complaint shall proceed only in respect of the charges under ss. 466 and 471 of the Indian Penal Code. As regards the other charges, namely, under ss. 193 and 218 of the Indian Penal Code, no action need be taken.

Partly allowed.

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DR. KRISHNA
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v.

THE STATE
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R. Chandra,
J.

APPELLATE CIVIL

*Before Mr. V. Bhargava, the Chief Justice and
Mr. Justice Lakshmi Prasad**

1966

March, 18

CHETU SINGH

... PETITIONER-APPELLANT

v.

JAI NARAIN SINGH AND OTHERS ... RESPONDENTS

U. P. Consolidation of Holdings Act, Act V of 1954, s. 21(2)—
first appeal under s. 21(2) to Settlement Officer Consolidation
—Second Appeal to Deputy Director of Consolidation under
s. 21(5) as it stood prior to U. P. Consolidation of Holdings
(Amendment) Act VIII of 1963—Second appeal disposed off—
Revision to Deputy Director against the first appellate order
not maintainable—Revision against the order of 2nd appeal
lay—Proviso to s. 47(1) of U. P. Consolidation of Holdings
(Amendment) Act (Act No. VIII of 1963) not applicable:

Second appeal under s. 21(5), as it stood prior to U. P. Consolidation of Holding (Amendment) Act (Act VIII of 1963) against the order passed in first appeal by the Settlement Officer, Consolidation, was disposed off by the Deputy Director of Consolidation. The result of the decision of the second appeal was that the first appellate order of the Settlement Officer Consolidation merged in the order made by the Deputy Director of Consolidation in second appeal. No revision to Deputy Director of Consolidation could be entertained against the order of Settlement Officer Consolidation made in first appeal after its confirmation in second appeal. However a revision lay against the order dated 16th March, 1963 passed by Deputy Director of Consolidation in second appeal as the proviso to s. 47(1) of U. P. Consolidation of Holdings (Amendment) Act (Act VIII of 1963) was not applicable. Under the main provision of sub-s. 1 of s. 47 of that amending Act the provisions of the un-amended Consolidation of Holdings Act as it stood before this amending Act was passed were applicable to the order in second appeal and consequently a revision against that order lay under the unamended Act to the Deputy Director.

A Deputy Director exercising the power of a Director can competently hear a revision transferred to him even though the revision may be directed against a second appellate order

* While sitting at Lucknow.

of a Deputy Director. In hearing the revision the Deputy Director exercises the powers of a Director and consequently he can interfere with the order of another Deputy Director.

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Special appeal No. 77 of 1965 against the decision dated August 5, 1965 passed by SAHGAL, J. dismissing the writ petition No. 25 of 1964.

Facts appear in the judgment.

K. S. Varma (absent) but *R. C. Srivastava* holding brief, for the appellant.

Ali Hasan, for Respondent No. 2.

The following Judgment of the Court was delivered by—

V. BHARGAVA, C. J.:—We have heard learned counsel on this special appeal which is directed against a judgment of a learned Single Judge of this Court dismissing a writ petition filed by the appellant. In the petition the prayer was for the quashing of two orders of the Deputy Director of Consolidation, dated 8th July, 1963 and 26th September, 1963.

Having heard the learned counsel we consider that the order of the Deputy Director of Consolidation, dated 26th September, 1963, was perfectly correct and could not be quashed. The order dated 26th September, 1963, was passed on an application for revision which was presented by the appellant against the order of the Settlement Officer, Consolidation in first appeal under s. 21 of the Consolidation of Holdings Act. At the time when the order in the first appeal was made by the Settlement Officer, Consolidation, a second appeal against his order lay and it was in fact filed, entertained and decided by a Deputy Director. The result of the decision of that second appeal was that the first appellate order of the Settlement Officer, Consolidation merged in the order made by the Deputy Director of Consolidation in second appeal. No revision could, therefore,

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be entertained against the order of the Settlement Officer, Consolidation made in first appeal after its confirmation in second appeal. The revision filed against that order of the Settlement Officer, Consolidation was, therefore, rightly dismissed by the order dated 26th September, 1963.

However, we find that so far as the order dated 8th July, 1963 is concerned, it was clearly wrong. That order was made dismissing the revision which was directed against the order of the Deputy Director of Consolidation passed in second appeal on 16th March, 1963. Since the second appeal was decided on 16th March, 1963, the proviso to s. 47(1) of the U. P. Consolidation of Holdings (Amendment) Act (Act VIII of 1963) was not applicable. Under the main provision of sub-s. (1) of s. 47 of that amending Act the provisions of the unamended Consolidation of Holdings Act as it stood before this amending Act was passed were applicable to the order made in second appeal and consequently a revision against that order lay under the unamended Act to the Deputy Director. This view of ours is in line with the Full Bench decision of this Court in *Sardar Singh v. Major Haren Singh* (1) in which the Full Bench recorded its opinion on 22nd December, 1965, and in which the final judgment of the Division Bench has also been delivered. It is, therefore, clear that the Deputy Director of Consolidation when he dismissed the revision on 8th July, 1963 on the ground that he had no jurisdiction to entertain the revision committed a clear error and refused to exercise jurisdiction which was vested in him.

The learned Single Judge refused the prayer for the quashing of this order of 8th July, 1963, on two grounds. One ground was that according to the learned Single Judge the appellant should have requested the Deputy

(1) Writ, no. 228 of 1963.

Director to transfer back the revision to the Director or he should have approached the Director and asked him to hear the revision himself. This view seems to have been expressed on the basis that the Deputy Director was not at all competent to hear the revision against the second appellate order of another Deputy Director. Actually the view of this Court is well established that a Deputy Director exercising the powers of a Director can competently hear a revision transferred to him even though the revision may be directed against a second appellate order of a Deputy Director. In hearing the revision the Deputy Director exercises the powers of a Director and consequently he can interfere with the orders of another Deputy Director. This reason given by the learned Single Judge was, therefore, not at all applicable.

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The second ground given by the learned Single Judge was that there had been laches and delay on the part of the appellant in approaching this Court against the order of 8th July, 1963. It is true that the appellant did not move this Court in writ petition within the usual period of 90 days of the passing of this order of 8th July, 1963. But he gave an adequate explanation for it. It seems that he was advised that since no revision lay against the second appellate order he should file a revision against the first appellate order of the Settlement Officer, Consolidation and that is why he moved the second revision application which was dismissed by the order dated 26th September, 1963, which we have already upheld above. Time having been spent in taking that remedy should in the circumstances of this case not have been considered as part of laches and delay on the part of the appellant and after that time is ignored, there is no such great laches or delay as would disentitle the appellant from seeking relief from this Court. As we have said above

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the Deputy Director of Consolidation by his order, dated 8th July, 1963, had refused to exercise jurisdiction clearly vested in him and this is a fit case where this Court should direct him to exercise that jurisdiction in accordance with law and decide the revision on merits.

In the result, we allow this special appeal, set aside the order of the learned Single Judge and grant the prayer in the petition to the extent that the order of the Deputy Director dated 8th July, 1963, is set aside. The effect of the setting aside of the order is that the revision by which that order was dismissed is again to be deemed to be pending and shall be decided on merits by the Deputy Director. In the circumstances of this case we direct the parties to bear their own costs of this special appeal as well as the writ petition.

Appeal allowed.

CIVIL MISCELLANEOUS

*Before Mr. V. Bhargava, the Chief Justice and
Mr. Justice Lakshmi Prasad**

HARBANS NARAIN AND ANOTHER ... PETITIONERS

v.

1966

April, 11

STATE OF UTTAR PRADESH AND ANOTHER
OPPOSITE-PARTIES

Indian Forest Act, 1927 ss. 18(4) and 16(5) of Act XXIII of 1965—Appellate orders under s. 17—Revision to State Government under s. 18(4)—Revision lay under s. 22 and not under s. 18(4) of the Act.

If the revisional powers, against the decision of Deputy Commissioner under s. 17 of the Act, could at all be exercised by the State Government, it could be under s. 22 of the Act and not under s. 18(4) of the Act.

S. 16(5) of the Indian Forest Act (Uttar Pradesh Amendment) (U. P. Act No. XXIII of 1965) do not apply in the present case because the revision purporting to be made under sub-s. 4 of s. 18 of the Act were made more than five years prior to the commencement of the amending Act of 1965.

Writ petition No. 80 of 1959 connected with writ petitions Nos. 102 of 1959, 44, 165, 190, 313 to 324 of 1960 and Writ Petitions Nos. 71 to 74 of 1961.

R. N. Shukla, for the petitioners.

Standing Counsel K. S. Varma, for the Opp. Parties.

The following Judgment of the Court was delivered by—

V. BHARGAVA, C. J.:—All these 21 petitions under Art. 226 of the Constitution raise an identical point which has to be decided on the basis of identical findings

* While sitting at Lucknow.

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of fact. In all these cases the petitioners claim to be lessees of land in respect of which the State Government took proceedings under s. 3 of the Indian Forest Act (hereinafter referred to as the Act) declaring the lands as reserved forest. The petitioners filed objections under s. 6 of the Act claiming that they were lessees of the lands by virtue of leases granted to them prior to the enforcement of the U. P. Zamindari Abolition and Land Reforms Act by the then proprietors of the lands. In the claims filed, the petitioners claimed that they were sirdars and desired that the lands should be wholly excluded from the limits of the proposed reserved forest. The claims were admitted wholly in the case of each of the petitioners by the Forest Settlement Officer under s. 11(1) of the Act, and under s. 11(2) of the Act the lands were excluded from the limits of the proposed forest. Appeals were filed against these decisions to the Deputy Commissioner under s. 17 of the Act and they were also all dismissed. Thereafter the Divisional Forest Officer purported to file revisions against the orders passed by the Forest Settlement Officer and the Deputy Commissioner under s. 18(4) of the Act. All these revisions were allowed by the State Government and the State Government purported to reject the claims which had been filed by these petitioners. The petitioners filed these writ petitions in this Court praying for the quashing of this order purported to be passed by the State Government under s. 18(4) of the Act.

Similar petitions came up earlier before this Court and were dealt with by a Division Bench. The decision of the Division Bench is reported in *Raghu-nath Singh v. The State of Uttar Pradesh* (1). In that case this Court allowed the writ petitions on two

(1) 1961 A.L.J. 686.

grounds. One ground was that in respect of the lands which were sought to be included in reserved forest under s. 3 of the Act, proceedings taken were vitiated, because these lands were not the property of the Government or were not lands over which the Government had proprietary rights, or in respect of which the Government had a right to the whole or any part of the forest produce. The second ground given by the Court was that no revisions lay to the State Government under s. 18(4) of the Act and the exercise of the power by the State Government purporting to be under s. 18(4) of the Act was, therefore, without any jurisdiction. It was therefore, held that the orders passed by the State Government in revisions were vitiated on both these grounds and were liable to be quashed.

Since then there has been a decision of the Supreme Court in *Mahendra Lal v. The State of Uttar Pradesh* (1) in which the Supreme Court has held that even bhumidhars are mere tenure holders under the State which is the proprietor of all lands in the area to which the U. P. Zamindari Abolition and Land Reforms Act applies and such bhumidhars cannot claim to be proprietors to whom Chap. II of the Indian Forest Act would not apply. Consequently, this point taken in these writ petitions and decided by the Division Bench in the earlier case cannot help the petitioners.

However, there was a second point decided in that case by the Division Bench on the basis of which we consider that the petitioner in all these petitions must succeed. In that case it was held by the Division Bench that against appellate orders passed in appeals under s. 17 of the Act a revision did not lie under s. 18(4) of the Act at all. The revision could in fact be made under s. 22 of the Act, and the mention of s. 18(4) of the Act must be interpreted to refer to the

(1) A.I.R. 1968 S.C. 1019.

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revision made competently by the State Government under s. 22 of the Act. Against that judgment the State Government obtained leave from this Court and filed an appeal before the Supreme Court. The appeal, was, however, withdrawn and that judgment, therefore, became final. That decision being a decision by a Division Bench of this Court is to be followed by us in all these present writ petitions.

In accordance with that decision we have to hold that in these cases also if a revisional power could at all be exercised by the State Government it could be under s. 22 of the Act only and that there was no independent revisional power to be exercised under s. 18(4) of the Act. The learned Standing Counsel appearing for the State did not contend before us that the State Government in any of these cases purported to exercise its revisional power under s. 22 of the Act. The inapplicability of s. 22 is thus admitted on behalf of the State Government itself. Once it is held that the revisional power was not exercised under s. 22 of the Act the effect of the decision of the Division Bench, which has become final, is that the order purported to be passed in exercise of the revisional power under s. 18(4) was without jurisdiction and void and consequently the order is liable to be quashed.

The learned Standing Counsel drew our attention to s. 16(5) of the Indian Forest (Uttar Pradesh Amendment) Act (U. P. Act XXIII of 1965), which came into force on the 23rd November, 1965 and urged that in these cases the State Government may be empowered to exercise its discretion of referring the case to the Tribunal under s. 16(5) of this Amending Act. We have examined the facts of all these writ petitions and we find that in all these cases the revisions purporting to be made under sub-s. (4) of s. 18 of the Act were made

before 23rd November, 1960, i.e. more than five years prior to the commencement of the Amending Act of 1965. S. 16(5) of the Amending Act only permits reference to the Tribunal in cases where the revision was filed within five years of the commencement of the Amending Act. All these cases relate to revisions which were filed more than five years before the commencement of the Amending Act and, consequently the provisions of s. 16(5) of the Amending Act are not at all applicable.

In these circumstances the orders made in revision by the Government purporting to act under s. 18(4) of the Act are quashed; so that the effective orders will be the orders made in appeals under s. 17 of the Act. In all these petitions the petitioners will be entitled to their costs from the opposite parties.

Revisions allowed.

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CIVIL MISCELLANEOUS

*Before Mr. V. Bhargava, the Chief Justice and
Mr. Justice Lakshmi Prasad**

BHAN SINGH

... PETITIONER

1966
April, 11

v.

THE REGIONAL TRANSPORT AUTHORITY,
MEERUT REGION, MEERUT AND OTHERS

RESPONDENTS

Motor Vehicles Act, (1939), Ss. 57(8) and 64(a) and (b)—Order under s. 57(8) by R. T. A. varying the conditions of a permit—Appeal lies to prescribed authority under s. 64(b) and not under s. 64(a).

An order passed by the Regional Transport Authority under s. 57(8) of the Motor Vehicles Act, 1939 is appealable to prescribed authority only under s. 64(b) and not under s. 64(a). S. 57(8) deals with an application to R. T. A. to vary the conditions of a permit. If an order is made varying the conditions of a permit, an appeal would lie under s. 64(b) which specifically provides for appeals against orders passed under s. 57(8) but if an order does not vary any of the conditions of the permit cl. (b) of s. 64 would not apply and no appeal under that provision would lie.

An application under s. 57(8) cannot be deemed to be an application for the grant of a permit so as to attract s. 64(a) firstly because s. 64(b) specifically provides for appeal against the order passed under s. 57(8), secondly the exercise of power under s. 57(8) is only to vary the conditions of the permit and not to attach conditions to the permit, and the language used in s. 57(8) requiring an application to be treated as an application for the grant of a new permit is procedural only.

Reference by a Single Judge to the Bench for opinion in Writ Petition No. 320 of 1964.

A. J. Fanthome, for the Petitioner.

Mohd. Husain, for the Opposite-Party No. 3

*While sitting at Lucknow.

The following Judgment of the Court was delivered by—

V. BHARGAVA, C. J.:—The question referred for our opinion by the learned single Judge is:

“Whether an order passed by the Regional Transport Authority on an application under sub-s. (8) of s. 57 of the Motor Vehicles Act, 1939 is appealable to the prescribed authority under s. 64 of the Act?”

We have heard learned counsel for the parties and have also gone through the judgment of Hon'ble R. S. PATHAK, J. which has occasioned this reference in this case. Before us as well as before Hon'ble R. S. PATHAK, J. the suggestion made was limited to cls. (a) and (b) of s. 64 of the Motor Vehicles Act so that we are not concerned with the other clauses of s. 64.

It appears to us that so far as cl. (b) of s. 64 is concerned it specifically provides for appeals against orders made under s. 57(8). S. 57(8) deals with an application to vary the conditions of any permit by the inclusion of a new route or routes or a new area or, in the case of a stage carriage permit, by increasing the number of services above the specified maximum, or in the case of a contract carriage permit or a public carrier's permit, by increasing the number of vehicles covered by the permit. When such an application is dealt with the Regional Transport Authority can only make two kinds of orders: one can be an order varying the conditions and the other would be an order refusing to vary the conditions. If an order is made varying the conditions, it is very clear that an appeal would lie under s. 64 (b) which specifically grants a right of appeal to a person aggrieved by a variation of the conditions of a permit. On the other hand, if an order does not vary any of the conditions of the permit, cl. (b) of s. 64 would not apply and no appeal under that provision would lie. It will, of course, be a question of interpretation in each individual case

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whether a particular order, which is sought to be taken up in appeal, does or does not vary any condition of a permit.

As regards cl. (a) of s. 64, we are of the opinion that its provisions cannot apply to an order made on an application under s. 57(8). An application under s. 57(8) is limited to the purpose of applying for variation of the conditions of a permit. The reference in s. 64(a) is to a condition attached to a permit granted to a person. Clearly under s. 57(8) conditions are not attached to a permit. They are attached at an earlier stage when the permit is issued or granted. Under s. 57(8), the applications are limited to seeking orders for variation of conditions of a permit and the specific provision for appeal, when there is a variation of conditions of a permit under cl. (b) of s. 64, precludes the interpretation that any such variation can be treated as a condition attached to a permit for the purpose of cl. (a) of s. 64. We are also in agreement with Hon'ble R. S. PATHAK, J. that an application for varying the conditions of a permit under s. 57(8) cannot be deemed to be an application for the grant of a permit. All that that provision of law lays down is that the application be treated as an application for grant of a new permit which means that in dealing with that application the Regional Transport Authority is to deal with it in the same manner and according to the same procedure which would be applicable to an application for grant of a new permit. The language does not convert an application for varying conditions of a permit into an application for grant of a new permit. In fact, if there had been any intention to convert by a fiction of law an application to vary the conditions of a permit into an application for grant of a new permit, then this could have been very easily indicated by using slightly different language and saying that an application to vary the conditions of a permit shall be deemed

to be an application for the grant of a new permit instead of merely saying that it shall be treated as an application for the grant of a new permit, Cl. (a) of s. 64 cannot therefore, apply to any order made under s. 57(8). The right of appeal against an order made on an application under s. 57(8) is governed by cl. (b) of s. 64 and that is right as we have indicated above.

Let the record be returned to the learned single judge V. Bhargava, with this opinion.

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Reference answered.

APPELLATE CIVIL

Before Mr. Justice N. U. Beg and Mr. Justice G. D. Sahgal*

SMT. RAMAPATI DEVI AND OTHERS

LEGAL REPRESENTATIVE OF MUNNA LAL

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SMT. CHANDO BIBI AND ANOTHER ... RESPONDENTS

Succession Act, 1925, s. 82—Will—Construction of—Hindu Succession Act, 1956, S. 14(2)—Decree—Meaning of—Trial Court granted a declaration that the widow held house No. 2 for her life as a Hindu Widow—Appeal against—During the pendency of the appeal the Hindu Succession Act, 1956 came into force—Upheld that widow became an absolute owner of House No. 2—Decree passed by the trial court is not a decree within the meaning of s. 14(2) of the Act.

The elementary rule of Construction of Wills is that the intention of the testator should be gathered by giving a harmonious interpretation to the various terms of the Will as a whole.

Held, that direction regarding residence of heirs was a pious wish and not mandatory injunction to the legatee so as to create a legal right in the heirs.

The decree contemplated under sub-s. (2) of s. 14 of the Act appears to be a decree finally adjudicating the rights of the parties, where an appeal has been filed against a decree so that the final adjudication of the rights of the parties would depend upon the decree passed in the appellate court the decree passed by the trial Court cannot be said to be a decree contemplated by sub-s. (2). The appeal is a continuation of the suit. The result of the appeal would be that the sanctity of the decree would be taken away and the decree passed by the appellate court adjudicating the right of the parties would supersede the decree of the trial court.

Further the decree under sub-s. (2) of s. 14 contemplates only a decree where the property is acquired by a Hindu widow by the said decree. In other words the decree mentioned in sub-s. (2) is a decree which forms the foundation of the title of the widow where the widow gets a life estate under the right of inheritance possessed by her and the decree merely declares her estate to be a widow's estate, the decree is not the foundation of her right or the basis of her title but merely a recognition of the same.

* While sitting at Lucknow.

Special appeal No. 54 of 1962 against the judgment and decree dated 16th February, 1962, passed by J SAHAI, in First Civil Appeal No. 23 of 1952.

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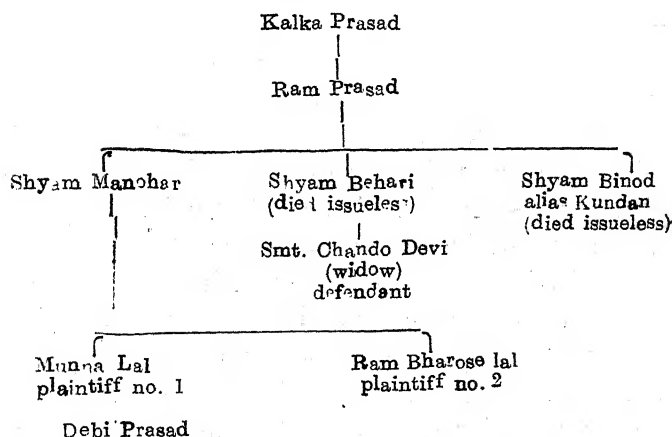
Facts appear in the judgment.

B. K. Dhaon, for the Appellant.

R. N. Shukla, for the Respondent no. 1.

The following Judgment of the Court was delivered by—

N. U. BEG, J.:—This is a plaintiffs' Special appeal arising out of a suit for declaration. The property in dispute consists of two houses nos. 1 and 2 in this judgment. The common ancestor of the parties was one Ram Prasad. The following geneological table will be helpful for understanding the facts of the case:



The plaintiffs' case was that Shyam Manohar, the father of plaintiffs nos. 1 and 2, and Shyam Binod had died during the life-time of Ram Prasad, their father. Shyam Binod had died issueless. Ram Prasad died in 1920. After his death Shyam Behari, the husband of the defendant Smt. Chando Devi and the plaintiffs be-

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came the owners of the house in dispute as members of a joint Hindu family. After the death of Shyam Behari in 1938 the plaintiffs became the owners of the property in dispute to the extent of half and the defendant as the Hindu widow of Shyam Behari became entitled to a life estate in the remaining half. On the 24th March, 1916, Ram Prasad had executed a will bequeathing his entire property in favour of his son Shyam Behari with direction therein to the effect that plaintiffs would have a right of residence in house no. 1 with the consent of Shyam Behari. The plaintiffs' case that the property in dispute being ancestral property, Ram Prasad had no right to execute the will in respect of it and the will executed by him cannot, therefore, affect their rights. In the alternative, the plaintiffs' case was that even if the will in question be considered to be a valid will they had a right of residence in house no. 1 under the said will.

The defendant contested the plaintiffs' case. So far as house no. 1 is concerned, the defendant's case was that Pandit Ram Prasad was the absolute owner of the property, and, after his death the said house became the absolute property of his son Shyam Behari as the sole legatee of all his properties under the will dated the 24th March, 1916, and that the said house was given by Shyam Behari to the defendant by a gift deed dated the 10th March, 1930. So far as house no. 2 was concerned, it was built by Shyam Behari with his own money, and Shyam Behari had on the 29th August, 1938, executed a will bequeathing house no. 2 amongst other properties in favour of his wife Smt. Chando Devi, defendant. Shyam Behari died on the 3rd September, 1938. So far as the will of Shyam Behari dated 29th August, 1938, is concerned, the plaintiffs' case was that the said will was not genuine as the testator did not possess a sound disposing mind at the time of its execution.

On behalf of the plaintiffs it was conceded before the trial Court that there was no evidence to show that the properties in dispute were ancestral properties in the hands of Ram Prasad. The plaintiffs also admitted the due execution of the will by Ram Prasad. As to the will dated the 29th August, 1938, set up by the defendant, the trial Court found that it was not executed by the testator while in a sound disposing mind and the said will was, therefore, not a genuine will. The trial Court further found that the plaintiffs had no right to reside in house no. 1. The trial Court, accordingly, came to the conclusion that the only declaration to which the plaintiffs were entitled was that the defendant held house no. 2 as a Hindu widow. It, therefore, decreed the plaintiffs' suit to the extent that it granted a declaration that the defendant held house no. 2 for her life as a Hindu widow. For the rest it dismissed the plaintiffs' suit.

Dissatisfied with the judgment and decree of the trial Court, the defendant filed an appeal against the decree in so far as it rejected her claim to absolute rights in house no. 1. The plaintiffs also filed cross-objections against the part of the decree rejecting their claim to a right of residence in house no. 1.

The appeal came up for decision before a learned single Judge of this Court. Before him it was argued on behalf of the defendant-appellant that during the pendency of the appeal, the Hindu Succession Act (Act No. XXX of 1956), hereinafter referred to as "the Act", had come into force. Under s. 14 of the Act the life estate of the widow had been enlarged into an absolute estate, and therefore, the decree of the trial Court in so far as it declared that the defendant had only a widow's estate for life in house no. 2 should be set aside and she would be declared to be the absolute owner

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of the same. The learned single Judge accepted this contention and allowed the defendant's appeal holding that the defendant had, as a result of the coming into force of the Act, become an absolute owner of house no. 2. The cross-objections filed by the plaintiffs in respect of house no. 1 were dismissed. In the result, the defendant was declared to be the full owner of both the houses. Dissatisfied with the judgment and decree of the learned single Judge, plaintiff Manna Lal filed the present special appeal. He, however, died during the pendency of the appeal and was substituted by his heirs and legal representatives who figure as appellants now. Respondent no. 1 was the defendant Smt. Chandu Bibi. Ram Bharosey Lal, plaintiff no. 2, has been impleaded as respondent no. 2.

So far as house no. 1 is concerned, the argument of the learned counsel for the appellants before us was that under the terms of the will executed by Ram Prasad on the 24th March, 1916, the plaintiffs got a right of residence in the side house. On the other hand, on behalf of the respondent no. 1 it was contended that on a proper construction of the will the plaintiffs cannot claim to reside in the said house as a matter of right. The question depends on the interpretation of the terms of the will. Cl. 2 of the will which is relevant in this connection states that the testator was bequeathing all his moveable and immovable properties which belonged to the testator at the date of the execution of the will or became his property in future in favour of Shyam Behari, his son, without excluding anything with all rights of transfer. It then goes on to state that the remaining heirs would only have a right of residence in the said house with the consent of the legatee. Subsequently, the clause lays down that in case any of the heirs commits any act of misconduct so

as to bring bad name to the testator or to the legatee, then the said heir would be deprived of the right of residence altogether. It further states that the heirs would have the right of residence only on condition of their good character and with the consent of the legatee but that they would have no proprietary rights in any of the properties. Cl. 2 closes with the following statement, "I have full confidence that Shyam Behari, the said legatee, will observe all the said conditions and follow the instructions given to him." The elementary rule of construction of wills is that the intention of the testator should be gathered by giving a harmonious interpretation to the various terms of the will as a whole. The terms of the above will clearly indicate that the testator did not intend to create any right in favour of heirs other than the legatee. The heirs are allowed a right of residence only on the condition that the legatee accords his consent to it. The direction regarding the residence of the heirs appears only to be a pious wish and not a mandatory injunction to the legatee so as to create a legal right in the heirs. Their right of residence is further subject to their maintaining good character so as not to commit any act which would affect adversely on the fair reputation or honour of the testator and the legatee. The fact that the direction regarding residence is merely of a recommendatory nature is further borne out by the closing sentence of cl. 2 which states that the testator had full confidence that the legatee would observe all the conditions laid down by him. For the above reasons, we are of opinion that there is no force in this part of the argument of the learned counsel for the appellants.

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The next argument of the learned counsel for the appellants related to house no. 2. The contention of the learned counsel for the appellants that in the present case the life estate of the widow would not be enlarged

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into an absolute estate under s. 14, sub-s. (1) of the Act, because the present case falls within the exception contained in sub-s. (2) of s. 14. S. 14 of the Act provides as follows:

"14. (1) Any property possessed by a female Hindu whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation—In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *Stridhana* immediately before the commencement of this Act.

(2) Nothing contained in sub-s. (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree order or award prescribe a restricted estate in such property."

It is rightly conceded by the learned counsel for the appellants that the Act being a retrospective one, the effect of sub-s. (1) of s. 14 standing by itself would be to enlarge the estate of the widow into an absolute estate. The learned counsel for the appellants, however argues that the exception provided in sub-s. (2) would apply to the present case because in the present case the trial Court has passed a decree declaring the defendant's right to be that of a Hindu widow. We are unable to

accept this contention. The decree contemplated under sub-s. (2) of s. 14 of the Act appears to be a decree finally adjudicating the rights of the parties where an appeal has been filed against a decree so that the final adjudication of the rights of the parties would depend upon the decree passed in the appellate Court, the decree passed by the trial Court cannot be said to be a decree contemplated by sub-s. (2). The appeal is a continuation of the suit. The result of filing the appeal would be that the sanctity of the decree would be taken away and the decree passed by the appellate Court adjudicating the rights of the parties would supersede, the decree of the trial Court. In the present case it cannot be said that any decree had been passed finally determining the rights of the parties. Sub-s. (2), accordingly cannot be invoked to cover the present case. Reference in this connection might also be made to *Pathumma Beebi v. Krishnan Asari* (1) following *Karri Venkamma v. Karri Venkatarreddi* (2) and *Vadrevu Annapurnamma v. Vadrevu Bhima Sankararao* (3) which would support the same view.

We are further of opinion that there is another reason why sub-s. (2) of s. 14 would be inapplicable to the present case. Sub-s. (2) contemplates only a decree where the property is acquired by a Hindu widow by the said decree. In other words, the decree mentioned in sub-s. (2) is a decree which forms the foundation of the title of the widow. Where the widow gets a life estate under the right of inheritance possessed by her and the decree merely declares her estate to be a widow's estate, the decree is not the foundation of her right or the basis of her title but merely a recognition of the same. A Hindu widow's right to hold the estate of her husband for her lifetime may be recognised by several decrees passed in a number of suits filed by different

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(1) A.I.R. 1981 Kerala 247.

(2) A.I.R. 1959 And. Pra. 158.

(3) A.I.R. 1960 And. Pra. 359.

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claimants. Can it be said that her right to a widow's estate is acquired by all the decrees passed in various suits. It is obvious that the decree passed in such suits do not create any right or title in her. They merely declare or recognise a right already created in her favour under the personal law to which she is subject. The view taken by us would be supported by a single Judge decision of this Court in *Smt. Janak Dulari v. District Judge, Kanpur* (1).

The learned Counsel for the appellants argued that the view taken in the said case should be considered to be incorrect bearing in mind the subsequent decision of their Lordships of the Supreme Court in the case of *Munnalal v. Rajkumar* (2). In this case it was held by their Lordships of the Supreme Court that the share of a Jain widow, declared by a preliminary decree passed in a suit for partition of joint family property is a share "possessed" by her within the meaning of s. 14 of the Act and if the widow died before actual division of the estate, the interest declared in her favour devolves upon her son to the exclusion of her grandson. It was further held that by s. 14(1) of the Act the interest of a Hindu female which under the shastric Hindu law would be regarded as a limited interest, is converted into an absolute interest. It was further held that the explanation to s. 14(1) gives to the expression "property" the widest connotation so as to include within the ambit of the said word the share declared by a preliminary decree for partition in favour of a Hindu widow even though there has been no actual division of the share by partition of the joint family estate. In this case there was a preliminary decree for partition declaring the share of a widow in joint family in lieu of her right to maintenance. It was argued against her that the right of a Hindu widow to maintenance from the joint

(1) A.I.R. 1961 All. 294.

(2) A.I.R. 1962 S.C. 1998.

family property being of an inchoate character continued to retain that character till actual division was made with the result that if she died before actual division, this inchoate interest reverted to the estate out of which it was carved out. It cannot, therefore, be considered to be property possessed by a Hindu widow within the meaning of s. 14(1) of the Act. Their Lordships of the Supreme Court repelled this contention holding that the word "property" was used in s. 14(1), as the explanation of the said sub-section would indicate, in its widest connotation. This case appears to us to be clearly distinguishable from the present one. In this case the question that arose was whether the right in question can be considered to be "property possessed" by a Hindu female within the meaning of s. 14(1) of the Act. The question of interpretation of sub-s. (2) of s. 14 never arose for consideration in this case. In the present case we are concerned not with the meaning of the expression "property possessed" in sub-s. (2) of s. 14 but with the meaning of the words "property acquired" in sub-s. (2) of s. 14. This case, therefore, cannot be pressed into service for the purpose of lending support to the contention advanced on behalf of the appellants.

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Further, it may also be noted that in the case cited the widow did not possess the right of inheritance in the estate as a Hindu widow nor any such question arose for consideration in the said case. The husband of the widow having died prior to the Hindu Women's Right to Property Act (No. XVIII of 1937), the widow had merely a right of maintenance. It could, therefore, be said that her right to a share in the family property came into existence for the first time as a result of the partition decree. The partition decree did not declare her pre-existing right. On the other hand, it carved out a new right, namely a right to a share in the estate

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in lieu of her previous right, namely a right to maintenance out of the joint family property.

For the above reasons, we are of opinion that the contention of the learned Counsel for the appellants in regard to house no. 2 also fails and has no substance.

We, accordingly, dismiss this appeal with costs.

Appeal dismissed.

CIVIL MISCELLANEOUS

*Before Mr. V. Bhargava, the Chief Justice and
Mr. Justice Lakshmi Prasad.**

DWARKA PRASAD AND OTHERS ... PETITIONERS,

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ADDITIONAL COMMISSIONER, LUCKNOW.

FAIZABAD DIVISION, AND OTHERS ... OPPOSITE-
PARTIES.

U. P. (Temporary) Control of Rent and Eviction Act, 1947—

S. 3—*Permission to sue on the ground of personal need—Governing principles.*

There are no fixed principles of law governing the exercise of the discretion by the District Magistrate or the Rent Control and Eviction Officer in granting or refusing permission under s. 3 of the Act. The matter being left to the discretion of the District Magistrate or the Rent Control and Eviction Officer, all that High Court at best can see is whether that discretion has been judicially exercised. There must be a fair comparison of the rights of landlord and tenant and permission under s. 3 of the Act should only be granted where it is considered justified that the rights of the tenant should be sacrificed in the interest of the rights of landlord. The principles applicable to a decision on an application under r. 6 of the Rules framed under the U. P. (Temporary) Rent Control and Eviction Act cannot be applied to an application under s. 3 for permission to file a suit.

It is not for the High Court to sit in judgment over the opinion of Rent Control and Eviction Officer or the Additional Commissioner exercising revisional powers in the matter of deciding where equities in such a case lie.

There is no bar under law to an accommodation being broken up into two parts with the permission of a District Magistrate or a Rent Control and Eviction Officer if both the landlord and tenant agree and desire to it.

Writ Petition no. 110 of 1962 against the judgment and order, dated 27th January, 1962 passed by the Additional Commissioner, Lucknow-Faizabad Division dismissing the revision against the order of Rent Control and Eviction Officer, dated the 18th August, 1961.

* While sitting at Lucknow.

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Facts appear in the judgment.

Ram Surat Singh v. R. C. & E. O. (1) distinguished.

S. M. Yousuf, for the Petitioner.

B. K. Dhaon and M. L. Trivedi, for the Opposite-parties 4 and 5.

The following judgment of the Court was delivered by—

V. BHARGAVA, C. J.:—This petition under Art. 226 of the Constitution of India is directed against an order of the Rent Control and Eviction Officer dated the 18th August, 1961, and an order passed by the Additional Commissioner in revision dated the 27th January, 1962, by which the Additional Commissioner dismissed the revision filed by the petitioners and upheld the order of the Rent Control and Eviction Officer dated the 18th August, 1961. The order of the Rent Control and Eviction Officer, dated the 18th August, 1961 was passed on an application made by the petitioners for permission to institute a suit for ejection of opposite-parties nos. 4 and 5 under s. 3 of the U. P. (Temporary) Control of Rent and Eviction Act. The permission was sought on the ground that the petitioners needed the accommodation which was let out to opposite-parties 4 and 5 for their own personal use.

The Rent Control and Eviction Officer made enquiries and came to the finding that the petitioners were living in such conditions that they genuinely needed residential accommodation for their own occupation and, that, therefore, it would be fair that the petitioners should be allowed to occupy the residential portion of this accommodation. The petitioners also wanted permission to eject the tenants from the shops which also form part of the accommodation. With regard to this part of the claim, the finding recorded was that there was no

(1) 1964 A.L.J. 412.

genuine need of the petitioners for shop accommodation whereas the shop accommodation was definitely needed by the opposite-party no. 4 who had a well-established whole-sale business in those shops. The Rent Control and Eviction Officer further held that if the opposite-parties were ejected from the shops, their business would very considerably suffer. In these circumstances, a compromise was suggested before him under which the opposite-parties agreed to give up the residential accommodation subject to two conditions viz. that the rent payable by them should be proportionately reduced and that they should be reimbursed for the expenditure that they had incurred on improvements and additions to the accommodation with the permission of the original landlord from whom they had taken the premises on tenancy. The petitioners refused to agree to this compromise. Thereupon, the Rent Control and Eviction Officer disallowed the application for permission to sue for ejectment of the opposite-parties but added that the petitioners will have the option to have the accommodation which the opposite-parties had agreed to spare in the house in dispute and that in case the opposite-parties went back on the compromise made the petitioners could apply afresh for permission. This was the very order that was upheld in revision by the Additional Commissioner.

In the course of submissions before us in this petition, it was not suggested that the Rent Control and Eviction Officer and the Additional Commissioner committed any error of jurisdiction in coming to their decisions. Consequently, we have to see whether there is any manifest error of law apparent on the face of the record in their orders. Under s. 3 of the U. P. (Temporary) Control of Rent and Eviction Act, the District Magistrate or the Rent Control and Eviction Officer exercising the powers

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of the District Magistrate has been given the power to grant permission to institute a suit for ejectment but no specific principles have been laid down indicating when permission should be granted and when it should be refused. Generally, permission has been granted where it has been found that the landlord needs the accommodation for his own use and there would be no serious prejudice to the tenant if such permission is granted. There are, however, no fixed principles of law governing the exercise of the discretion by the District Magistrate or the Rent Control and Eviction Officer in granting or refusing permission and, consequently, if on taking various factors into consideration, permission is refused it appears impossible to hold that any error of law will be committed. The matter being left to the discretion of the District Magistrate or the Rent Control and Eviction Officer, all that the Court at best can see is whether that discretion has been judicially exercised and in the present case we are unable to see that there is any such error in the exercise of this discretion by the Rent Control and Eviction Officer. In fact, he went out of his way to arrange an equitable compromise between the parties. It is true that under the law a District Magistrate or a Rent Control and Eviction Officer cannot break the integrity of a contract of tenancy under his own powers. But there is no bar to an accommodation being broken up into two parts with his permission if both the landlord and the tenant agree and desire that this be done. All contracts of tenancy can be altered by a landlord and the tenant agreeing together with the consent of the District Magistrate or the Rent Control and Eviction Officer. In this case, therefore, the compromise which was suggested could easily have been given effect to if the petitioners had agreed to that compromise. The petitioners did not agree to it and wanted that they should be permitted to eject the opposite-parties from the entire accommodation

including the shops which according to the Rent Control and Eviction Officer would have seriously prejudiced the business of the opposite-parties. In these circumstances, the Rent Control and Eviction Officer felt that the equities were not in favour of the petitioners and there was no sufficient ground for granting permission to the petitioners to eject the opposite-parties from the entire accommodation. In doing so the Rent Control and Eviction Officer naturally compared the relative needs of the petitioners and the opposite-parties and based his order on the equities as they appeared to him. It is not for us to sit in judgment over the opinion of the Rent Control and Eviction Officer or the Additional Commissioner exercising revisional powers in the matter of deciding where equities in such a case lie. The discretion is with them and that discretion having been exercised on equitable grounds as they appeared to them, this Court cannot now sit as an appellate Court and substitute its own opinion for their opinions.

In these circumstances, it was urged by the learned Counsel for the petitioners before us that, once it was held that the need of the petitioners for residential accommodation was genuine, there was no option left to the Rent Control and Eviction Officer or the Additional Commissioner to refuse to grant the permission sought and for this proposition the learned Counsel referred us to a Full Bench decision in the case of *Ram Surat Singh v. Rent Control and Eviction Officer* (1). It appears to us that that decision is totally inapplicable to the present case. In that case, the Full Bench had to consider the manner in which a Rent Control and Eviction Officer is to act when there is an application by a landlord under r. 6 of the Rules framed under the U. P. (Temporary) Control of Rent and Eviction Act. It was not a case where considerations for grant of permission under s. 3

(1) 1964 A.L.J. 412.

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of that Act had to be examined. So far as r. 6 is concerned, it comes into play when an accommodation is vacant or is likely to fall vacant and the persons wanting to occupy it are the landlord himself and other outsiders who desire to occupy it by being nominated as tenants for that accommodation. In those circumstances, it is clear that the claimants rival to the landlord have no existing rights at all in that accommodation. They only come as claimants who desire that the rights of tenancy should be conferred on them and it was held by this Court that in these circumstances there can be no comparison of the needs of the landlord and those persons. The decision was that if the need of the landlord was genuine and *bona fide* there was no option except to release the accommodation in favour of the landlord. The same principles do not apply where the lis is between a landlord and a person who is already in possession of the property as a tenant by virtue of existing rights. It is to be noticed that the U. P. (Temporary) Control of Rent and Eviction Act was itself enacted mainly for the protection of tenants and the main protection was against ejectment by landlords. When there is an existing tenant in an accommodation his rights were sought to be protected by the enforcement of this Act and in this case what has been done by the Rent Control and Eviction Officer and the Additional Commissioner is to protect those rights of the existing tenants. When there is a tenant who already has existing rights in an accommodation and these rights are sought to be taken away by landlord by instituting a suit after obtaining permission under s. 3 of the Act, it is obvious that there must be a fair comparison of the rights of the two rival parties and permission should only be granted where it is considered justified that the rights of the tenant should be sacrificed in the interest of the rights of the landlord. In cases, where permission is to be granted under s. 3 of the Act,

therefore, there has to be a comparison of the claims of the landlord and the existing tenant while there can be no such comparison in cases filed under r. 6 where the landlord is the only person having existing rights in the property and the other rival claimants are persons who have no existing rights but desire that new rights should be conferred on them. The principles applicable to a decision on an application under r. 6 cannot, therefore, be applied to an application under s. 3 for permission to file a suit. The decision cited on behalf of the petitioners mentioned by us above is, therefore, not applicable to the present case.

No other error of law in the orders impugned was pointed to us. The case was referred to a Division Bench by a learned single Judge for consideration of one other point viz. whether the original petitioner Ram Lakhan Gupta having died his legal representatives can continue this petition. Since we are holding that on merits the petition has no force and fails, we do not think that we need go into this aspect at all. In the circumstances, the petition has no force and is dismissed with costs.

Writ dismissed.

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CIVIL REVISION

Before Mr. Justice B. Dayal and Mr. Justice Seth
THE GENERAL MANAGER, NORTH-EASTERN
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1968
July, 14.

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PARAS NATH TEWARI ... OPPOSITE-PARTY.

Payment of Wages Act, 1936, s. 17—District Court hearing appeal—Status of—Whether a *persona designata* or a civil court—Whether sub-ordinate to the High Court.

Where power is given to an established court, whether it was to be exercised as *persona designata* or as a court, the criterion to determine is whether it was conferred on the Judge as an individual or in capacity as a court;

Held, the District Court hearing an appeal under s. 17 of the Payment of Wages Act acts as a civil court subordinate to the High Court and not as *persona designata*.

Hanskumar Kishan Chand v. The Union of India (1) distinguished.

Rajkumar Mills Ltd. v. Inspector, Payment of Wages (2) followed.

Civil Revision no. 755 of 1962 connected with Civil Revision no. 696 of 1964 against the Judgment and decree of K. N. SRIVASTAVA, District Judge, Gorakhpur, in Miscellaneous Appeal no. 41 of 1961 decided on 30th April, 1962.

D. Sanyal, for the Applicants.

S. C. Khare and V. B. Khare, for the Opposite-party.

The following judgment of the Court was delivered by—

B. DAYAL, J.:—These are two connected references by a single Judge of the Court. The only question to be answered is:

“Does the District court hearing the appeal under s. 17 of the Payment of Wages Act act as a civil court

(1) A.I.R. 1958 S.C. 947.

(2) A.I.R. 1955 M.B. 60.

subordinate to the High Court or functions as a *persona designata*?"

The question, as it is framed, confines the answer only to the effect whether the District Court hearing an appeal under s. 17 is a civil court subordinate to the High Court or is a *persona designata*. S. 15 of the said Act provides as follows:

"The State Government may, by notification in the Official Gazette, appoint any Commissioner for Workmen's Compensation or other officer with experience as a Judge of a civil court or as a stipendiary Magistrate to be the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages, of persons employed or paid in that area."

By s. 17, an order, either dismissing an application under sub-s. (1) of s. 15 or making directions under sub-s. (3) of s. 15 on that application is made appealable to the District Judge in District Court other than the Presidency towns. By cls. (a) and (b) limits of pecuniary valuation is also provided below which an appeal does not lie and by sub-s. (2) orders passed under s. 15 have been declared to be final except as mentioned in s. 17. What has to be noted in these sections is that under sub-s. (1) of s. 15, the authority which is to receive the application for compensation is "to hear and decide" the dispute raised in that application. It is also to be noted that when an appeal is to be filed before the District Judge, no procedure is provided for hearing of such appeals and the intention apparently is that the District Judge, who is already a civil court empowered to hear civil appeals is authorised to hear these kinds of appeals also in the course of its ordinary jurisdiction as a civil court. Our attention was also drawn to s. 22 of the Act by which the jurisdiction of the civil court is barred and it is

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provided that no suit shall lie for the recovery of any wages or any deductions from the wages in so far as such sums can be claimed under s. 15. To our mind, s. 22 has no bearing on the question referred to us. The bar of a regular civil suit would not affect the nature of powers under which the District Judge hears an appeal when it comes before him under s. 17.

In order to constitute a Tribunal a *persona designata* what has to be seen is whether the powers given to that Tribunal are merely an extenuation of the powers which it had already possessed, if the power is given to a regularly established court, or whether that particular work has been given to a individual Judge holding that office in his personal capacity and not in his capacity as a court. The question as to when the Tribunal constituted a *persona designata* came up for consideration before their Lordships of the Supreme Court in *Central Talkies Ltd., Kanpur v. Dwarika Prasad* (1). That was a case under the U. P. (Temporary) Control of Rent and Eviction Act. The landlord made an application to the District Magistrate for permission to file a suit for ejectment of the tenant. The permission was granted by the Additional District Magistrate to whom that duty had been delegated by the District Magistrate and a suit for ejectment of the tenant was filed in the civil court. In an appeal before the High Court against the decree for ejectment, a question was raised that the permission granted by the Additional District Magistrate was not valid as the District Magistrate who had been authorised to grant the permission was a *persona designata* and he, therefore, could not delegate that power to the Additional District Magistrate. This plea was repelled by this Court and the matter was raised again in an appeal before the Supreme Court and in this connection their Lordships of the Supreme Court observed as follows:

(1) 1961 A.L.J. p. 215.

"Learned Counsel for the appellants contended that the definition of 'District Magistrate' clearly showed that in addition to the District Magistrate, only an officer specially authorised by him could act under the Eviction Act The argument was that the special jurisdiction created by the Eviction Act was not affected by s. 19(2) of the Code, in view of the provisions of this sub-s. . . . The argument that the District Magistrate was a *persona designata* cannot be accepted. Under the definition of 'District Magistrate', the special authorisation by the District Magistrate had the effect of creating officers exercising the powers of a District Magistrate under the Eviction Act A *persona designata* is a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class or as filling a particular character."

Their Lordships of the Supreme Court quoted with approval the following from *Parthasaradhi Naidu v. Koteswara Rao*, 1923 (1):

"Persons selected to act in their private capacity and not in their capacity as Judges."

In the present case, therefore, when the power to hear an appeal is given to the District Judge as such and not to any individual, it must be assumed as power given to the court of the District Judge and not as a *persona designata* to any particular Judge. A similar matter was also considered by their Lordships of the Supreme Court in *National Sewing Thread Co. Ltd. v. James Chadwick and Bros. Ltd.* (2). This was an appeal in a trade mark matter. Orders passed by the Registrar under the Act were appealable to the High Court and a decision given by a learned single Judge of the High Court was sought

(1) 1923 I.L.R. 47 Mad. 369 (F.B.). (2) A.I.R. 1958 S.C. p. 357.

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to be appealed under the Letters Patent. The question arose whether the appeal under the Letters Patent was entertainable and their Lordships held that it did lie. It was observed that the Trade Marks Act did not provide for any procedure to be followed in the conduct of appeals and consequently it was held that after the appeal had reached the High Court, it had to be determined according to the rules of practice and procedure of that Court and in accordance with the provisions of the charter under which that Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. Their Lordships quoted with approval the remarks of the House of Lords in *National Telephone Company Ltd. v. His Majesty's Postmaster General* (1):

"When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches."

As against this, learned Counsel for the other side relied upon the case of *Hans Kumar Kishan Chand v. The Union of India* (2). That was a case under the Defence of India Act. An arbitrator had been appointed to determine the amount payable to the claimant. This determined amount was called an award under s. 19(i)(f) of the Act. An appeal was provided against that award to the High Court. Against such a decision of the High Court an appeal was filed before the Federal Court and in that connection it was held that the High Court was hearing a civil appeal against an award and the decision of the High Court also partook of the nature of the award and, therefore, no further appeal lay under the Consti-

(1) 1913 A.C. 546.

(2) A.I.R. 1958 S.C. p. 947.

tution to the Federal Court or to the Supreme Court. Their Lordships summed up the law on the subject in the following words:

"Where the dispute is referred to the Court for determination by way of arbitration as in *Rangoon Botatoung Co. Ltd. v. Collector* (1) or where it comes by way of appeal against what is statedly an award . . . then the decision is not a judgment, decree or order under either the Code of Civil Procedure or the Letters Patent."

Their Lordships then proceeded to distinguish the cases like the *National Telephone Co. Ltd. v. Postmaster General* (2), where the matter was referred to a established Court and held that in those cases the consideration could be different. We, therefore, think that the principle laid down by the Supreme Court in this case is not applicable to the facts of the present case. The question, which is now referred to us, was the precise question, which was raised before the Madhya Bharat High Court in *Rajkumar Mills Ltd. v. Inspector, Payment of Wages* (3) and the learned Judges held as follows:

"When an appeal is provided for under s. 17 to the District Court, that Court is appealed to as one of the ordinary courts of the country, consequently its orders and decrees will be governed by the rules of C. P. Code. Therefore a revision is competent against the decision of the District Court under s. 115 C. P. C."

While coming to this conclusion, the learned Judges reviewed a large number of cases. A learned single Judge of this Court also came to the same conclusion on exactly the same point which is now before us.

In *Divisional Accounts Officer, E. I. Railway, Lucknow v. Satpal Singh* (4), a Full Bench decision of this

(1) Rangoon 39 I.A. p. 197.

(2) 1913 A.C. p. 546.

(3) A.I.R. 1955 M. Bharat p. 60.

(4) A.I.R. 1955 N.U.C. 2751.

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Court also points to the same conclusion. In *Chatur Mohan v. Ram Behari Dixit* (1), where the question for consideration was whether the Munsif to whom powers had been given under s. 7-E of the U. P. (Temporary) Control of Rent and Eviction Act decided those matters as a *persona designata* or as a court and whether a revision lay against the order passed by the Munsif under those powers. It was held that the powers were given to the Munsif as an established court and not as a *persona designata* and a revision was held entertainable.

On a consideration of these authorities, we answer the question referred to us as follows:

"The District Court hearing an appeal under S. 17 of the Payment of Wages Act acts as a civil court subordinate to the High Court and not as a *persona designata*."

Let the papers be returned to the learned single Judge with the above answer on the question referred to us.

Question answered.

(1) 1964 A.L.J. p. 256.

SUPREME COURT

APPELLATE CIVIL

*Before the Hon'ble Mr. Subba Rao, Chief Justice, the
Hon'ble Mr. Justice Hidayatullah, the Hon'ble Mr.
Justice Sikri, the Hon'ble Mr. Justice Rama-
swami and the Hon'ble Mr. Justice Shelat.*

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v.

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... RESPONDENTS.

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Land Acquisition Act, (I of) 1894, ss. 4, 5-A, 6 and 17—Mirzapur Stone Mahal Act (U. P. Act V of) 1886, s. 5—Regulation VIII of 1793—Acquisition by Government of 'waste' and 'arable' land—Validity of,—Scope of Court's power in,—Ownership or grant of land—Whether and when includes rights over minerals—Grant of Agori Raj—Whether included quarries, etc.

It is manifest that the declaration made by the State Government through a notification under s. 6(1) of the Land Acquisition Act that the land was required for a 'public purpose' is made conclusive by sub-s. (3) of s. 6 and it is, therefore, not open to a Court to go behind it and try to satisfy itself whether in fact the acquisition is for a public purpose. The only exception where it is otherwise and the declaration is open to challenge at the instance of the aggrieved party are cases of a colourable exercise of power e.g. where what the Government is satisfied about is not a public purpose but a private purpose or of no purpose at all.

It is well established that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact, the High Court, in a proceeding for a Writ of *certiorari*, is entitled, upon its independent judgment, to determine whether or not that finding is correct.

Where, as in this case, the land sought to be acquired is not 'waste' or 'arable' land within the meaning of sub-s. (1) or (4) of s. 17 of the Land Acquisition Act, all the proceedings and notifications for the acquisition of land on the assumption to the contrary would be *ultra vires* and illegal and liable to be quashed. It is true that the determination of the nature of the land depends upon and is ordinarily left to the subjective satisfaction of the State Government, it can nonetheless be challenged as *ultra vires* in a Court of law if it would be shown that the State Government never applied its mind to the matter or its action

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is *mala fide* and such inference may legitimately be drawn in a case where the land is not actually 'waste' or 'arable'.

Prima facie the owner of the surface of land is entitled *de jure* to every thing within or beneath the land and in the absence of any reservation, express or implied, in the grant or transfer, the mines, quarries and minerals necessarily pass or are acquired with the surface. There being nothing to warrant such reservation in the Sanads or grant to the Raja of Agori, the sub-soil and mineral rights in the estate equally vested in and belonged to the Raja. Mirzapur Stone Mahal Act was meant only for regulating the quarrying of the building stone and there is nothing in that Act or the rules framed thereunder to affect the right of the proprietor to the sub-soil minerals.

Civil Appeal no. 656 of 1964 from the Judgment and Decree dated the 2nd November, 1962 of the Allahabad High Court in Civil Miscellaneous Writ no. 454 of 1955.

B. R. L. Iyengar, (V. P. Misra, S. K. Mehta and K. L. Mehta, with him) for the Appellant.

C. K. Daphtary, Attorney-General for India and Shanti Bhushan (O. P. Rana with them) for the Respondents nos. 1 and 2.

The following Judgment of the Court was delivered by—

RAMASWAMI, J.:—This appeal is brought, by special leave, against the judgment of the Allahabad High Court dated 2nd November, 1962 dismissing the writ petition no. 454 of 1955 filed by the appellant—Raja Anand Brahma Shah.

The appellant was the Zamindar of Pargana Agori lying to the south of Kaimur Range in the district of Mirzapur. On 4th October, 1950, a notification was issued by the State Government under s. 4(1) of the Land Acquisition Act (hereinafter referred to as the "Act") stating that the area of 409.6 acres in the village of Markundi Ghurma Pargana Agori was needed for a public purpose. The purpose specified in the notification was "for lime-

stone quarry". The notification provided that the case being one of urgency, the provisions of sub-s. (1) of s. 17 of the Act applied to the land and it was therefore directed under sub-s. (4) of s. 17 that the provisions of s. 5-A of the Act would not apply to the land. On 12th December, 1950, a further notification was issued under s. 6 of the Act declaring that the Governor was satisfied that the land mentioned in the notification was needed for public purposes and directing the Collector of Mirzapur to take order for acquisition of the land under s. 7 of the Act. The Collector of Mirzapur was further directed by the notification under s. 17(1) of the Act, the case being one of urgency, to take possession of any waste or arable land on the expiration of the notice mentioned in s. 9(1), though no award under s. 11 had been made. On 19th November, 1950, possession of the land was taken by the Collector of Mirzapur and the same was handed over to the Administrative Officer, Government Cement Factory, Churk. An award was made by the Land Acquisition Officer on 7th January, 1952, stating that the amount of compensation was Rs. 23,638-13-7. The appellant thereafter filed an application under s. 18 of the Act for a reference to the Civil Court in regard to the amount of compensation payable. A reference to the Civil Court was accordingly made and the matter is still pending in the Civil Court as Land Acquisition Reference no. 4 of 1952. On 2nd May, 1955, the Writ Petition giving rise to this appeal was filed by the appellant in the Allahabad High Court. It is alleged by the appellant that the acquisition of the land was not for a public purpose and the acquisition proceedings were consequently without jurisdiction. It was also stated that the State Government had no jurisdiction to apply the provisions of s. 17(1) of the Act to the land in dispute as it was neither waste nor arable land. It was further claimed that the mines and minerals in the land belonged to

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the appellant and as such he was entitled to compensation for the same. The appellant accordingly prayed for a writ in the nature of *certiorari* to quash the notifications of the State Government under ss. 4 and 6 of the Act and further proceedings in pursuance of that notice in the land acquisition case. The appellant also prayed that the State Government should be directed to pay compensation to the appellant for all the lime-stone removed from the land. By its judgment dated 2nd November, 1962 the High Court dismissed the Writ Petition, holding (1) that the petitioner was not the owner of mines and minerals and was not entitled to compensation for them (2) that the land had been acquired for a public purpose, and (3) that the provisions of s. 17 of the Act were applicable to the case and there was no illegality in the notifications of the State Government under ss. 4 and 6 of the Act.

The first question to be considered is whether the notification of the State Government under s. 4 of the Act dated 4th October, 1950 is liable to be quashed on the ground that the acquisition of the land was not for a public purpose. It was alleged for the appellant that the lime-stone extracted from quarries situated in the land was used by the State Government for the manufacture of cement which was sold for profit in open market and was not used for any public work of construction. It was contended that the manufacture of cement for being sold for profit will not amount to a public purpose and the notification of the State Government under s. 4 of the Act must therefore be held to be illegal. In our opinion, the argument put forward on behalf of the appellant cannot be accepted. It is manifest that the declaration made by the State Government in the notification under s. 6(1) of the Act, that the land was required for a public purpose, is made conclusive by sub-s. (3) of s. 6 and it is;

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therefore, not open to a court to go behind it and try to satisfy itself whether in fact the acquisition was for a public purpose. It was pointed out by this Court in *Smt. Somavanti v. The State of Punjab* (1) that it was for the Government to be satisfied, in a particular case, that the purpose for which the land was needed was a public purpose and the declaration of the Government under s. 6(1) of the Act will be final subject, however, to one exception, namely in the case of colourable exercise of the power, the declaration is open to challenge at the instance of the aggrieved party. The power conferred on the Government by the Act is a limited power in the sense that it can be exercised only where it is for a public purpose (leaving aside, for the moment, where the acquisition is for a company under Part VII of the Act). If it appears that what the Government is satisfied about is not a public purpose but a private purpose or no purpose at all, the action of the Government would be colourable as being outside the power conferred upon it by the Act and its declaration under s. 6 of the Act will be a nullity. On behalf of the respondents the argument was stressed that the lime-stone was utilised for being used in the cement factory established in the Public Sector at Churk. It was argued that the production of cement was important in national interest, particularly when the cement was used in the construction of the Rihand dam. It is conceded on behalf of the respondents that the allegation of the appellant that cement was being sold in market for profit was not clearly controverted by the counter-affidavit by the State but it was said that even on the assumption that the cement was sold for profit the use of the lime-stone in the production of the cement was in public interest, because the profit from the sale of cement benefited the General Revenues of the State. It is not necessary for us to express any concluded opinion as to whether the production of cement as a commercial enter

(1) [1963] 2 S.C.R. 774.

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prise is a public purpose within the meaning of the Act for we consider that the principle of the decision of this Court in *Smt. Somavanti v. The State of Punjab* (1) applies to this case and the argument of the appellant must be rejected because he has not been able to show that the action of the Government in issuing the notification under s. 6 of the Act is a colourable exercise of power.

We then proceed to consider the argument of the appellant that the notification under s. 4 of the Act is illegal since the land in dispute is neither waste nor arable land and the jurisdiction of the State Government to act under s. 17(1) and s. 17(4) of the Act depends upon the preliminary condition that the land to be acquired is waste or arable land. The argument was stressed that since the jurisdiction of the State Government depends upon the preliminary finding of fact that the land is waste or arable, the High Court is entitled, in a proceeding for a writ of *certiorari*, to determine, upon its independent judgment, whether or not that finding of fact is correct. It is necessary, at this stage, to set out the relevant provisions of the Act. S. 4(1) of the Act states:

"4. (1) Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality."

S. 5-A provides for the hearing of objections and reads:

"5-A. (1) Any person interested in any land which has been notified under s. 4, sub-s. (1), as being needed or likely to be needed for a public purpose or for a Company may, within thirty days after the issue of the notification, object to the acquisi-

(1) [1963] 2 S.C.R. 774.

tion of the land or of any land in the locality, as the case may be.

(2) Every objection under sub-s. (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard either in person or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, submit the case for the decision of the appropriate Government, together with the record of the proceedings held by him and a report containing his recommendations on the objections. The decision of the appropriate Government on the objections shall be final"

S. 6 provides:

"6. (1) Subject to the provisions of Part VII of this Act when the appropriate Government is satisfied, after considering the report, if any, made under s. 5-A, sub-s. (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorized to certify its orders:

Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

(2) The declaration shall be published in the Official Gazette, and shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

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(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing."

S. 16 relates to the power of the Collector to take possession of the land. It reads:

"16. When the Collector has made an award under s. 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances."

S. 17 confers special powers in cases of urgency and reads as follows:

"17. (1) In cases of urgency, whenever the appropriate Government so directs the Collector though no such award has been made may, on the expiration of fifteen days from the publication of the notice mentioned in s. 9, sub-s. (1), take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

(2) Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a riverside or ghat station, or of providing convenient connection with or access to any such station, the Collector may, immediately after the publication of the notice mentioned in sub-s. (1) and with the previous sanction of the appropriate Government, enter upon and take possession of such land, which shall thereupon

vest absolutely in the Government free from all encumbrances.

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(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-s. (1) or sub-s. (2) are applicable, the appropriate Government may direct that the provisions of s. 5-A shall not apply, and, if it does so direct, a declaration may be made under s. 6 in respect of the land at any time after the publication of the notification under s. 4, sub-s. (1)."

On behalf of the appellant Mr. *Iyengar* referred to the Inspection Note of the Collector dated 15th December, 1951 at page 91 of the Paper Book. It was pointed out that the Collector noticed that there were one lac of trees in the acquired land and there were trees of "Tendu, Asan, Sidh, Bijaisal, Khair, bamboo clumbs, Mahuwa and Kakora contained in the area". It was contended that the land in dispute was 'forest land' covered by a large number of trees and cannot be treated as "waste land or arable land" within s. 17(1) or (4) of the Act. In our opinion, the argument put forward on behalf of the appellant is well-founded and must be accepted as correct and in view of the facts mentioned in the affidavits and in the Inspection Note of the Collector, dated 15th December, 1951 we are of the opinion that the land sought to be acquired is not 'waste land' or 'arable land' within the meaning of s. 17(1) or (4) of the Act. According to the Oxford Dictionary 'arable land' is "land which is capable of being ploughed or fit for tillage". In the context of s. 17(1) of the Act the expression must be construed to mean "lands which are mainly used for ploughing and for raising crops" and therefore the land acquir-

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ed in this case is not arable land. Similarly, the expression "waste land" also will not apply to 'forest land'. According to the Oxford Dictionary the expression "waste" is defined as follows:

"Waste—(from Latin, vastus—waste, desert, unoccupied); Uncultivated, incapable of cultivation or habitation; producing little or no vegetation barren, desert."

The expression "waste land" as contrasted to "arable land" would therefore mean "land which is unfit for cultivation or habitation, desolate and barren land with little or no vegetation thereon." It follows therefore that s. 17(1) of the Act is not attracted to the present case and the State Government had therefore no authority to give a direction to the Collector to take possession of the lands under s. 17(1) of the Act. In our opinion, the condition imposed by s. 17(1) is a condition upon which the jurisdiction of the State Government depends and it is obvious that by wrongly deciding the question as to the character of the land the State Government cannot give itself jurisdiction to give a direction to the Collector to take possession of the land under s. 17(1) of the Act. It is well-established that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact the High Court is entitled, in a proceeding of writ of *certiorari* to determine, upon its independent judgment, whether or not that finding of fact is correct [See *R. v. Shoreditch Assessment Committee* (1) and *White and Collins v. Minister of health* (2).]

We are accordingly of the opinion that the direction of the State Government under s. 17(1) and the action of the Collector in taking possession of the land under that subsection is *ultra vires*.

(1) [1910] 2 K.B. 859.

(2) [1939] 2 K.B. 836.

It was also contended for the appellant that the order of the State Government under s. 17(4) of the Act that the provisions of s. 5-A of the Act were not applicable to the land was illegal because the land was not waste or arable land to which the provisions of s. 17(1) were applicable. It was urged that by issuing the impugned notification the State Government deprived the appellant of a valuable right *i.e.*, of filing an objection under s. 5-A of the Act and therefore the entire proceedings taken by the Land Acquisition Officer after the issue of the notification under s. 4 were defective in law. On behalf of the respondents the submission was made that the condition precedent for the application of s. 17(4) of the Act was the subjective opinion of the State Government that the provisions of sub-s. (1) are applicable to the land in question. If therefore the State Government had come to the conclusion that the provisions of sub-s. (1) were applicable to the land because the land was waste or arable land, the subjective opinion of the State Government cannot be challenged in a Court of law except on the ground of colourable exercise of power. It was also contended that the declaration of the State Government in the impugned notification that in its opinion the provisions of sub-s. (1) are applicable, must be taken as normally conclusive.

It is true that the opinion of the State Government which is a condition for the exercise of the power under s. 17(4) of the Act, is subjective and a Court cannot normally enquire whether there were sufficient grounds or justification of the opinion formed by the State Government under s. 17(4). The legal position has been explained by the Judicial Committee in *King Emperor v. Shibnath Banerjee* (1) and by this Court in a recent case—*Jaichand Lal Sethia v. State of West Bengal & Ors.* (2).

(1) 72 I.A. 241.

(2) Criminal appeal no. 110 of 1966 decided on July 27, 1966.

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But even though the power of the State Government has been formulated under s. 17(4) of the Act in subjective terms the expression of opinion of the State Government can be challenged as *ultra vires* in a Court of law if it could be shown that the State Government never applied its mind to the matter or that the action of the State Government is *mala fide*. If therefore in a case the land under acquisition is not actually waste or arable land but the State Government has formed the opinion that the provisions of sub-s. (1) of s. 17 are applicable, the Court may legitimately draw an inference that the State Government did not honestly form that opinion or that in forming that opinion the State Government did not apply its mind to the relevant facts bearing on the question at issue. It follows therefore that the notification of the State Government under s. 17(4) of the Act directing that the provisions of s. 5-A shall not apply to the land is *ultra vires*. The view that we have expressed is borne out by the decision of the Judicial Committee in *Estate and Trust Agencies Ltd. v. Singapore Improvement Trust* (1) in which a declaration made by the Improvement Trust of Singapore under s. 57 of the Singapore Improvement Ordinance, 1927 that the appellants' property was in an insanitary condition and therefore liable to be demolished was challenged. S. 57 of the Ordinance stated as follows:

"57. Whenever it appears to the Board that within its administrative area any building which is used or is intended or is likely to be used as a dwelling place is of such a construction or is in such a condition as to be unfit for human habitation, the Board may by resolution declare such building to be insanitary."

(1) 1937 A.C. 898.

The Judicial Committee set aside the declaration of the Improvement Trust on two grounds: (1) that though it was made in exercise of an administrative function and in good faith, the power was limited by the terms of the said Ordinance and therefore the declaration was liable to a challenge if the authority stepped beyond those terms and (2) that the ground on which it was made was other than the one set out in the Ordinance. In another case—*Ross Glunis v. Papadopoulos* (1)—the appellant challenged an order of collective fine passed under Regulation 3 of the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955 which provided that if an offence was committed within any area of the colony and the Commissioner "has reason to believe" that all or any of the inhabitants of that area failed to take reasonable steps to prevent it and to render assistance to discover the offender or offenders it would be lawful for the Commissioner with the approval of the Governor to levy a collective fine after holding an inquiry in such manner as he thinks proper subject to satisfying himself that the inhabitants of the area had been given an adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon. It was contended on behalf of the appellant that the only duty cast on the Commissioner was to satisfy himself of the facts set out in the Regulation, that the test was a subjective one and that the statement as to the satisfaction in his affidavit was a complete answer to the contention of the respondents. In rejecting the contention the Judicial Committee observed as follows:

"Their Lordships feel the force of this argument, but they think that if it could be shown that there were no grounds upon which the Commissioner could be so satisfied, a court might infer either that

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(1) [1958] 1 W.L.R. 548.

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he did not honestly form that view or that in forming it he could not have applied his mind to the relevant facts."

In another case—*R. v. Australian Stevedoring Industry Board* (1)—the High Court of Australia was called upon to review the conduct of a board empowered to cancel the registration of an employer of dock labour if "satisfied" that he was unfit to be registered or had so acted as to interfere with the proper performance of stevedoring work. It was held by the High Court that it was entitled to award prohibition against the board if the board was acting without any evidence to support the facts upon which its jurisdiction depended, or if it was adopting an erroneous test of the employer's liability to cancellation of his registration, or if it appeared likely to go outside the scope of its statutory discretion.

We accordingly hold that the appellant has made good his submission on this aspect of the case and the notification of the State Government under s. 6 of the Act dated 12th December, 1950 is *ultra vires* and therefore all the proceedings taken by the Land Acquisition Officer subsequent to the issue of the notification under s. 6 must be held to be illegal and without jurisdiction.

We shall pass now to consider the question whether the appellant had sub-soil and mineral rights in the areas in dispute and whether the appellant was entitled to compensation for the minerals including lime-stone in that area.

It is necessary to set out at this stage the history of Agori Zamindari. The ancestors of Raja Anand Brahma Shah had owned the parganas of Agori and Barhar since the 13th century. About the year 1744 A. D. Shambhu Shah the then Raja was driven out of his domains by Raja Balwant Singh of Banaras, but after about 30 years

(1) [1952] 88 C.L.R. 100.

Adil Shah, grandson of Shambhu Shah was able to regain possession over the territories after driving out Raja Chet Singh, son of Raja Balwant Singh, with the help of the British East India Company. On 9th October, 1781, Raja Adil Shah was granted a Sanad by Mr. Warren Hastings the then Governor General of India restoring to him the Zamindari of Pargana Agori and Pargana Barhar with all the rights which his ancestors had before Shambhu Shah was driven out of his domains. By a second Sanad dated 15th October, 1871 the Raja was granted a Jagirultamgha of certain Mahals including Pargana Agori in lieu of Rs.8,001 per annum. It was stated for the respondent State that the second sanad was cancelled by a resolution of the Governor in Council dated April, 1788. But a third sanad was executed in favour of the Raja on 10th December, 1803 granting the whole Jagir permanently and making the Raja 'immovable Jagirdar of Mahal and everything appertaining thereto to belong to him'.

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On behalf of the appellant reference was made to the sanad granted by Mr. Warren Hastings dated 9th October, 1781 by which the Pargana of Agori was restored to Raja Adil Shah with all ancient and former rights in the Raj. The Sanad reads as follows:

"Know ye the present and future mutsuddies, Zamindars Chowdharies, canoogoes, Residents, Mahteas, ryots, cultivators and other inhabitants of pargunnah ageuree Burhas in the Sirkar of Chunnar, Soubah of Behar, that in consequences of the service of Lal Adil Shah in favour of the Hon'ble Company three Lacs and forty thousand drums which amounts to eight thousand and one rupees per annum, is granted to him as an Ultumgah jagger from the Kharie 'Illegible' Fussley year 1189 together with the mohala, sayar rukbah, plans or meadows

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thereof and exclusive of the deotter, Bharmotter, Krishuarpur lands, places of worship habitations of Brahmans and faquire and the Aymah, Mauffy and nomooly free rent free lands that he the said Adil Singh having the welfare of Government constantly in view, is to appropriate the produce thereof to his own use, year after year to be over prompt to secure and promote the prosperity of the Hon'ble Company to attend and on account be inattentive to the police, keep contended and satisfied all the Ryots, inhabitants and residents of the said Mahal to study and advance the welfare of the inhabitants to effect the Augmentation of cultivation of the whole Parganah.

* * * * *

Be it known to you Adil Singh Zamindar of Parganah Agori as it appears from your statement that the above Parganah is your ancient and hereditary estate and that some years ago Raja Balwant Singh forcibly dispossessed you and took possession of it himself. On a view therefore of your ancient right the Parganah is restored to you and you are required to bring it into cultivation obeying the orders of the Aumil and having the interest of Raja Mahipat Narain constantly in view. There in fail not dated 20th Shawaul 1195 Hidgree or the October, 1781 E. E."

The appellant further relied upon the Sanad dated 10th December, 1803 which confirmed all the rights granted in the 1781 Sanad and made the grant in perpetuity. The Sanad appears on page 79 of the Paper Book and reads as follows:

"Know, ye, the present and future Mutsuddies in office; the zamindars, the chowdhuries, the Residents, the Mahtobs, the Ryots, the cultivators, and

the inhabitants of Agori Barhar of Sirkar Chunar in Subah Allahabad, that in conformity to the orders of His Excellency the most Noble Richard Marquis Wellesley, Knight of the Illustrious order of Saint Patrick, Governor General-in-Council issued on the 4th November, 1803 on a consideration of the good services rendered to the Hon'ble Company by Raja Run Bahadur Shah, and his consequent merits, lands in the above Parganah producing Rs.4,000 to form a jagir of three lacs twenty thousands and forty dams which make eight thousand and one rupee per annum, as hereunder particularized of which a jagir of 4,001 rupees continues in the possession of the said Raja Run Bahadur Shah agreeably to sanad dated 7th October, 1789, English Era, have been given to him the said Raja as an ultumgah Jagger, from the Fussul Khareef of the fasli year 1211, corresponding with the English era 1803, together with the maul, Suyer, Ruchhah, plains or meadows thereof, and exclusive of Deuuttar, Burmotter and Krishnarpur lands, places of worship, habitations of Brahmans and Faquirs, ayumah, maufy, mamuliy, etc., rent free lands, that the said Raja is to appropriate the produce of the aforementioned jageer to his own use year after year, to be ever prompt to secure and promote the prosperity of the Hon'ble Company to attend strictly and conform to the rules and customs of Jagirs, to be on no account inattentive to, or neglectful of the police, to keep content and satisfied by good treatment, all the Ryots inhabitants, and residents of the said mahals to study and advance that the welfare of the inhabitants of the place to exert affectually and augment the cultivation of the whole pargana. * * * *

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That you are to consider him the Raja, immovable jagerdar of the mahal and every thing appertaining thereto, to belong to him be interested in his welfare and not demand on new sanad annually herein fail not but conform to the injunctions above given within the 11th day of the month of Poos 1211 Fussly; corresponding with the Engilsh era 1803.

Endorsement

Of the hereunder particularized Jagir, parganah Agori Burhar, producing three lacs twenty thousand and forty which make eight thousand and one rupee annually. Without fluctuations, land producing four thousand one rupee is already in the possession of Raja Run Bahadur Shah agreeably to a Sanad dated 7th October, 1789 and the remaining jageer of 4 thousand rupees have been already given and granted to him from the year 1211 Fussly together with the Raqbah plains, meadows and jungles thereof as an ultamagh jageer. Total villages 209 producing 8,001 rupees."

In our opinion, a reading of the two Sanads supports the case of the appellant that there is no reservation of mineral rights in favour of the Government. The expression used in the Sanad of 1803 A.D. is "You ought to consider him the Raja of immovable Jagir and of Mahal and everything appertaining thereto belongs to him." In effect, the grant to the Raja in the two Sanads is a grant of the lands comprised in the Mahal of Agori and everything appertaining thereto and as a matter of construction the grant must be taken to be not only of the land but also of everything beneath or within the land. *Prima facie* the owner of a surface of the land is entitled *ex jure* to everything beneath the land and in the absence of any reservation in the grant minerals necessarily pass with the rights to the surface (Halsbury's

Laws of England, 3rd Edn., Vol. 26, p. 325). In other words, a transfer of the right to the surface conveys right to the minerals underneath unless there is an express or implied reservation in the grant. A contract therefore to sell or grant a lease of land will generally include mines, quarries and minerals beneath or within it [*Mitchell v. Mosley*] (1). It is manifest that when the Sanad was executed in favour of the Raja the Government made over the land with all its capabilities to the Raja and merely imposed on him a fixed sum of revenue in lieu of all the rights the Government had as a proprietor of the soil. When neither of the parties knew undiscovered minerals underneath the land and the idea of reservation never entered their minds it cannot be held that there was any implied reservation in the grant. Nor can afterwards a distinction be drawn between the various rights that may exist on the land for the purpose of qualifying the original grant and importing into it what neither party could have imagined. It was argued on behalf of the respondents that the assessment was made on the agricultural income, but this circumstance cannot derogate from the rights conveyed to the Raja in the two Sanads because no restriction was placed on the use of the land and the use by the Raja was not limited to agriculture.

The view that we have expressed as to the interpretation and the legal effect of the Sanads is supported by Regulation VIII of 1793 which re-enacted with modifications and amendments the Rules for the Decennial Settlement of the public revenue payable from the lands of the zamindars, independent talukdars, and other actual proprietors of land in Bengal, Bihar and Orissa. S. 4 of this Regulation provided that the settlement, under certain restrictions and exceptions specified in the Regulation, shall be concluded with the actual proprietors of the

(1) (1914) 1 Ch. 498, 450.

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soil, of whatever denomination, whether zamindars, talukdars or chaudhris. It is clear that the zamindars with whom settlement took place, were recognised as the actual proprietors of the soil. The settlement of revenue so made was made permanent by s. 4 of Regulation I of 1793. This Regulation enacted certain Articles of a Proclamation dated 22nd March, 1793. S. 1 of this Regulation states that the various articles of the Proclamation were enacted into a Regulation and that those articles related to the limitation of public demand upon the lands, addressed by the Governor-General in Council to the zamindars, independent talukdars and other actual proprietors of land paying revenue to Government in the Provinces of Bengal, Bihar and Orissa. By s. 4 it was declared to the zamindars, independent talukdars and other actual proprietors of land, with or on behalf of whom a settlement had been concluded under the Regulations mentioned earlier, that at the expiration of the term of settlement no alteration would be made in the assessment which they had respectively engaged to pay, but that they and their heirs and lawful successors would be allowed to hold their estates at such assessment for ever.

The preamble to Regulation II of 1793, which abolished the Courts of Mal Adalat or Revenue Courts and transferred the trial of suits cognizable in those Courts to the Courts of Diwani Adalat, stated, in connection with the proposed improvements in agriculture as follows:

"As being the two fundamental measures essential to the attainment of it, the property in the soil has been declared to be vested in the landholders, and the revenue payable to Government from each estate has been fixed for ever . . . The property in the soil was never before formally declared to be vested in the landholders, nor were they allowed to

transfer such rights as they did possess, or raise money upon the credit of their tenures, without the previous sanction of Government."

The preamble to Regulation I of 1795 which relates to the Province of Benares states that "the Governor-General in Council having determined, with the concurrence of the Raja of Benares, to introduce into that province, as far as local circumstances will admit, the same system of interior administration as has been established in the provinces of Bengal, Bihar and Orissa, and the limitation of annual revenue payable from the lands forming an essential part of that system, as stated in the preamble to Regulation II, 1793."

It appears that Pargana Agori was permanently settled under the provisions of the Benares Regulation I of 1795 and there was no material difference between the permanent settlement of Benares province and that of the provinces of Bengal, Bihar and Orissa.

It is thus clear from the above Regulations that the zamindars, the proprietors of estates, were recognized to be the "proprietors of the soil" and the permanent settlement of the zamindaris proceeded upon that basis. Such a view was also expressed by the Judicial Committee in *Ranjit Singh v. Kali Dasi Debi* (1) at page 122:

"Passing to the Settlement of 1793, it appears to their Lordships to be beyond controversy that whatever doubts be entertained as to whether before the British occupation the zamindars had any proprietary interest in the lands comprised within their respective districts, the settlement itself recognizes and proceeds on the footing that they are the actual proprietors of the land for which they undertake to pay the Government revenue. The settlement is expressly made with the 'zamindars, independent talukdars and other actual proprietors of the soil';

(1) 44 I. A. 117.

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see Regulation I, s. 3, and Regulation VIII, s. 4. It is clear that since the settlement the zamindars have had at least a *prima facie* title to all lands for which they pay revenue, such lands being commonly referred to as malguzari lands."

The rights of the zamindars to the sub-soil minerals under their land were derived from their being proprietors of the soil and has been recognized in a number of cases between the zamindars and persons holding land under a tenure from them. It has been held in those cases that, in the absence of the right to sub-soil minerals being conferred on the tenure-holder under the terms of the tenure held by him, he does not get any right to them. In *Hari Narayan Singh v. Sriram Chakravarti*: (1) it has been held by the Judicial Committee that where a village is shown to be a mal village of the plaintiff's zamindari estate, the plaintiff must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them. In the course of its judgment the Judicial Committee quoted with approval the following passage from Field's "Introduction to the Bengal Regulations" p. 36, where he says:

The zamindar can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his zamindari, and the rights of mining, fishing, and other incorporeal rights are included in his proprietorship."

The same view has been expressed in *Durga Prasad Singh v. Braja Nath Bose* (2). In *Sashi Bhushan Misra v. Jyoti Prasad Singh Deo* (3) Lord BUCKMASTER stated with regard to the above two cases:

"These decisions, therefore, have laid down a principle which applies to and concludes the present

(1) 37 I. A. 136.

(2) 39 I. A. 133.

(3) 44 I. A. 46.

dispute. They establish that when a grant is made by a zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

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It is true that the Government was not a party to these decisions of the Judicial Committee but the fact that the Government never asserted its claim to mineral rights possessed by the zamindars is a circumstance which supports the interpretation of the Sanads which we have already expressed.

There are other documents which support the view that the mineral rights and sub-soil rights in the area belonged to the appellant. Annexure 'H' is a copy of the Wajibularz relating to Mauza Kota and Annexure 'I' is a copy of the Wajibularz of other villages Sali, Dokhli, Kaira and Rajpur Pargana Singrauli, district Mirzapur in respect of the settlement of 1247 Fasli and 1257 Fasli respectively. In Annexure 'H' there occurs the following passage:

"In this village there are Jungles and hills where all the said items such as dhup, shekae, catechu and coal are found. A sum of Rs.1-4 per tanga (ace) for producing dhup and shellac and Rs.1-8 per bhatti from catechu manufacturers is taken and one Mr. Burke has been given theka of coal by me at Rs.20 per annum for unlimited period."

In Annexure 'I' the following passage is found:

"A coal mine situate in Mauza Kota, Pargana Singrauli, was given to Mr. Burke under a perpetual lease in this way that he should remain in possession thereon during his lifetime on payment of the amount of Jama and that Mr. Burke aforesaid should all along remain in possession thereon so long as he

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continued to pay Rs.20 the fixed amount of Jama annually in a lump sum either in the month of Aghan or in Jeth. In case he fails to pay the same I have power to file a suit in the Civil Court to realise the amount from Mr. Burke aforesaid. Mr. Burke aforesaid has not the right to transfer the same. He should remain in possession thereon as long as he wishes to on payment of fixed amount of Jama."

There are also subordinate leases produced on behalf of the appellant to show that the right to minerals was always enjoyed by the appellant and not by the lessees: For instance, Annexure A-5 at page 125 of the Paper Book is a deed of agreement executed by Abtal Deo on 4th September, 1852. Para 4 of this agreement states:

"4. In this village, no Sayer item is produced; but whatever little or more fish, mangoes and Mauah are available we the occupants of the village enjoy and shall continue to enjoy the same. If something viz. iron ore, copper or treasure trove are discovered in this Mahal, the Raja Sahab shall be entitled to it. No other person should plant a new grove without the written permission of the Raja. If any one does so he shall be liable to pay Rs.10 per bigha and shall continue to pay annual Photo as heretofore."

There are similar clauses in the agreements—Annexures A-1 to A-4 and A-6 to A-13. Reference was also made on behalf of the appellant to the letter of Mr. Thornton dated 5th October, 1850 to the Secretary to the Suddar Board of Revenue, Annexure 'F' wherein he states that "In the settled portion of the Mirzapur district, the Government lays no claim to the soil which includes any mineral products that may be discovered." There is also a letter—Annexure 'G' dated 21st August, 1850 from Mr. Roberts, Deputy Collector, Mirzapur to the Commis-

sioner of Banaras Division. In this letter Mr. Roberts expressed the view that the right to minerals was vested in the proprietary owner of the soil and that the sovereign was only entitled to a portion of the revenue thereon and that "in Bengal, the proprietors of estates lease or assign the right of mining without any interference on the part of the Government."

It is manifest that the view that we have expressed as to the interpretation of the two Sanads dated 9th October, 1781—Annexure 'A'—and 10th December, 1803—Annexure 'B'—is supported by the subsequent events, proceedings and conduct of the parties over a long period of time. We are, therefore, of the opinion that the appellant is the owner of all minerals and sub-soil rights of Pargana Agori and the view taken by the High Court on this aspect of the case must be overruled.

On behalf of the respondents, reference was made to the Mirzapur Stone Mahal Act (U. P. Act V of 1886) and it was pointed out that under s. 5 of that Act "no proprietor was entitled to place any prohibition or restriction, or to demand or receive any sum by way of rent, premium, duty or price, in respect of the opening quarry, or the quarrying of stone, in the land, or in respect of the storing of stone at the quarry or the transport of stone over the land." But there is nothing in this statute which takes away the right of the zamindar to the minerals. It appears from the perusal of the Act and the Rules framed thereunder that the Mirzapur Stone Mahal Act was meant only for regulating the quarrying of building stone and was not meant to affect the right of the proprietors to the sub-soil minerals.

For the reasons already expressed we hold that the State Government has no jurisdiction to apply the provisions of s. 17(1) and (4) of the Act to the land in dispute and to order that the provisions of s. 5-A of the Act will not

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apply to the land. We are further of the opinion that the State Government had no jurisdiction to order the Collector of Mirzapur to take over possession of the land under s. 17(1) of the Act. The notification dated 4th October, 1950 is therefore illegal. For the same reasons the notification of the State Government under s. 6 of the Act, dated 12th December, 1950 is *ultra vires*.

We accordingly hold that a writ in the nature of *certiorari* should be granted quashing the notification of the State Government dated 4th October, 1950 by which the Governor has applied s. 17(1) and (4) to the land in dispute and directed that the provisions of s. 5-A of the Act should not apply to the land. We further order that the notification of the State Government dated 12th December, 1950 under s. 6 of the Act and also further proceedings taken in the land acquisition case after the issue of the notification should be quashed including the award dated 7th January, 1952 and the reference made to Civil Court under s. 18 of the Act.

In Writ Petition no. 454 of 1955 the appellant had prayed also for a writ in the nature of *mandamus* commanding the respondents to restore to him the possession of the lands in dispute, but in our judgment in *The State of Uttar Pradesh v. Raja Anand Brahma Shah and vice-versa* (1) pronounced today we have held that the intermediary interest of the appellant in respect of pargana Agori had validly vested in the State of U. P. by notifications issued on 30th June, 1953 and July 1, 1953 under the U. P. Zamindari Abolition and Land Reforms Act, 1951 [as subsequently amended by the U. P. Zamindari Abolition and Land Reforms (Amendment) Act, 1963] [U. P. Act no. 1 of 1964]. In view of this decision the claim of the appellant for restoration of possession of the land must be rejected.

(1) Civil Appeals 653, 654 and 655 of 1964.

We accordingly allow this appeal to the extent indicated above and set aside the judgment of the Allahabad High Court dated 2nd November, 1962. We do not propose to make any order as to costs.

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Ordered accordingly. Ramaswami,
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Ordered accordingly. Ramaswami,
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SUPREME COURT

APPELLATE CIVIL

*Before the Hon'ble Mr. Subba Rao, the Chief Justice,
the Hon'ble Mr. Justice Hidayatullah, the Hon'ble
Mr. Justice Sikri, the Hon'ble Mr. Justice
Ramaswami and the Hon'ble Mr. Justice
Shelat.*

THE STATE OF U. P. AND ANOTHER ... APPELLANTS
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(ON APPEAL FROM THE HIGH COURT AT
ALLAHABAD)

U. P. Zamindari Abolition and Land Reforms Act, 1950 (Act I
1951) as amended by Act I of 1964, s. 3(8)—Constitution of
India (1950), Art. 31-A(2)—Abolition and acquisition of
Zamindari in areas south of Kaimur Range including Par-
gana Agori in Mirzapur—Whether valid.

A grant by the British of lands for services rendered to them
would be a grant included within the definition of 'estate' under
cl. (a)(i) of Art. 31-A(2) of the Constitution.

The areas south of Kaimur Range including Pargana Agori
in Mirzapur is accordingly a grant in the nature of *jagir* or
inam and as such their acquisition by the State of Uttar Pradesh
by the relevant notifications under Act I of 1951 as amended
by Act I of 1964 is valid being covered and protected by the
clause aforesaid of the Constitution although the areas in ques-
tion could not be placed or shielded under cl. (a)(iii) of that
article in view of the fact that 'forest' or 'waste' land unless
held or let for purposes ancillary to agriculture is not an estate.

Civil Appeals nos. 653 to 655 of 1964 from the Judg-
ment and Decree dated the 1st November, 1962 of the
Allahabad High Court in Special Appeals nos. 267 and
292 of 1957.

C. K. Daphtary, Attorney-General for India and Shanti
Bhushan (O. P. Rana with them) for the Appellants (In

C. As. Nos. 653 and 654 of 1964) and the Respondents (In C. A. No. 655 of 1964).

A. K. Sen and B. R. L. Iyengar, (V. P. Misra. S. K. Mehta and K. L. Mehta with them) for the Respondent (In C. As. nos. 653 and 654 of 1964) and the Appellant (In C. A. no. 655 of 1964).

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The following Judgment of the Court was delivered by—

SIKRI, J.:—These appeals by certificates granted by the High Court of Judicature at Allahabad raise one principal question: Whether the amendment of the definition of the word 'estate' in cl. (8) of s. 3 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the Reforms Act) made by s. 2 of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 1963, hereinafter called the impugned Act, is within the definition of the word 'estate' in Art. 31-A(2) of the Constitution?

These appeals arise out of a petition filed by Raja Anand Brahma Shah of Agori Barhar-Raj under Art. 226 of the Constitution. The State of Uttar Pradesh had issued a notification no. 3549/1/A-499, dated 30th June, 1953, extending the provisions of Reforms Act, 1950, to apply to the areas to the South of Kaimur Range. It then issued another notification no. 3949/(1)-A-499-1949, dated July, 1953, directing the vesting of all 'estate' situated to the south of Kaimur including the Pargana Agori, owned by the petitioner. The Pargana Agori is comprised of 123 villages. At the time the petition was filed and the judgment of the Single Judge, dated 8th November, 1957, was delivered, s. 3(8) of the Reforms Act stood as follows:

"'Estate' means the area included under an entry in any of the registers prepared and maintained under cl. (a), (b), (c) or (d) of s. 32 of the United

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Provinces Land Revenue Act, 1901, or in the registers maintained under cl. (e) of the said section in so far as it relates to a permanent tenure-holder and includes share in or of an estate."

The case of the petitioner in short was that Pargana Agori was not an estate within s. 3(8) of the Reforms Act because no records were prepared and maintained under the provisions of s. 32 of the Land Revenue Act, 1901, in respect of Pargana Agori, and the records alleged to have been prepared between 1840 to 1843 under the Bengal Regulations were unauthorised and the Government itself did not approve these records at any time. The learned Single Judge, keeping in view the definition in s. 3(8) of the Reforms Act, came to the conclusion that the whole of 81 villages, including the cultivated area, the forest, the hill and everything else would vest in the State of Uttar Pradesh. He held that the Raja's name alone was entered in the khewats of 64 villages, and in the khewats of 17 villages although the names of under-proprietors were written, the Raja was the proprietor of the entire villages because the Raja's name was mentioned as 'Malik Ala'. With respect to the remaining 42 villages he held that only the areas mentioned in the khewats of the different villages and not the forests and hills attached to them fell within s. 3(8). In the result he allowed the petition in part and issued a writ of *mandamus* directing the respondents not to take possession nor to interfere with the possession of the petitioner over the hills and jungle appertaining to the said 42 villages as distinguished from the areas mentioned in the khewats of these villages at the time the vesting order was issued. He dismissed the rest of the claim. The petitioner and the State of Uttar Pradesh both filed appeals, the petitioner claiming that the petition should be allowed in entirety, the State claiming that the petition should be dismissed.

During the pendency of the appeals (U. P. Act XIV of 1958) substituted the following new s. 3(8) in the Reforms Act, with retrospective effect from July, 1952:

"3(8) 'Estate' means and shall be deemed to have always meant the area under one entry in any of the registers described in cl. (a), (b), (c) or (d) and, in so far as it relates to a permanent tenure-holder in any register described in cl. (e) of s. 32 of the U. P. Land Revenue Act, 1901, as it stood immediately prior to the coming into force of this Act, or, subject to the restriction mentioned with respect to the register described in cl. (e) in any of the registers maintained under s. 33 of the said Act or in a similar register described in or prepared or maintained under any other Act, Rule, Regulation or Order relating to the preparation or maintenance of record or rights in force at any time and includes share in or of an 'estate'.

Explanation—The Act, Rule, Regulation or Order referred to in this clause shall include Act, Rule, Regulation or Order made or promulgated by the erstwhile Indian State whose territories were merged or absorbed in the State of Uttar Pradesh prior to the date of vesting notified under s. 4 of this Act."

In the light of this definition the Division Bench came to the conclusion that only the areas expressly mentioned in the Khewats vested in the State. It accordingly dismissed the appeals filed by the State and partly allowed the appeal of the petitioner.

The State filed two petitions for leave to appeal, one against the judgment in Special Appeal no. 267/1957 and the other against the judgment in Special Appeal no. 292/1957. The Raja filed a petition for leave to appeal against the judgment in Special Appeal no. 267/1957.

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The High Court granted three certificates on 16th August, 1963, and three appeals are now before us, all arising out of the one petition under Art. 226 filed by the petitioner Raja.

On 1st January, 1964, the English translation of the impugned Act (U. P. Act no. 1 of 1964) was published, it having received assent of the President on 31st December, 1963. The relevant portion of the impugned Act reads as follows:

"Section 2. In the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter called the principal Act), in cl. (8) of s. 3, the following proviso shall, with effect from the first day of July, 1952, be added before the explanation, and the notifications issued under the principal Act (including ss. 2 and 4 thereof) or the U. P. Land Reforms (Amendment) Act, 1954 (including s. 1 thereof) or the U. P. Land Reforms (Amendment) Act, 1956 (including s. 1 thereof) or the U. P. Land Reforms (Amendment) Act, 1958 (including s. 1 thereof) shall, notwithstanding any judgment, decree, determination or order of any Court be so construed as if the said proviso had, since the said date, formed part of the principal Act, as also of the definition of the word 'estate' as given in the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 1958:

Provided that in Mirzapur District, each of the areas bounded as given in Sch. VII shall, notwithstanding anything contained in the foregoing definition, be deemed to be an estate.

3. After Sch. VI of the principal Act, the following new Schedule shall be added, and be deemed

to have been so added with effect from the first day of July, 1952:

Schedule VII

[See proviso to cl. (8) of s. 3]

1. The area known as Pargana Agori in district Mirzapur bounded in the North by the Kaimur Range confining with the villages Padaunian (also known as Parhwanian), Chingauri, Guraul (also known as Gurwal) Karaundia, Barauli, Dumkari Khirhata, Gadman, Khajraul (also known as Khajuraul) Dugauli, Baragaon, Jurauli, Kulani, Rajpur, Raipura, Senduri, Raghunathpur, Bahawar, Basauli, Baghuwari, Lodhi, Raunp, Musahi, Churk and Uraul (also known as Arauli) of Pargana Barhar and villages Biranchuwa, Makri Bari, Pokhraundh, Lauwa, Cherui, Baghma, Markundi of Pargana Bijaigarh of district Mirzapur as far as the western boundary of village Sasnai of Pargana Bijaigarh which then forms the boundary between Parganas Agori and Bijaigarh up to the point opposite the junction of the rivers Kanhar and Son and thence onward the River Son. forms its northern boundary.

in the east and south-east by the territory of the State of Bihar;

in the south by Tehsil Dudhi of district Mirzapur;

in the south-west and west by the territory of Madhya Pradesh (erstwhile Rewa State);

but excluding village Kishan Chak, which is a separate estate within Pargana Agori and is bounded on the north, east and south by village Kon Khas and in the west by village Mohiuddinpur of district Mirzapur."

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The learned counsel for the State has raised three points before us in the two appeals filed by the State:

(1) In view of the impugned Act Pargana Agori is an 'estate' within the Reforms Act;

(2) The High Court was in error in holding that on account of the mention of a wrong area in the khewat the entry cannot be said to be in respect of the entire area;

(3) Naksha Pattidaris prepared by Rai Manak Chand in 1843 in connection with settlement operations constituted record of rights.

On the first point Mr. *A. K. Sen*, the learned counsel for the Raja, contends that the impugned Act cannot be saved under Art. 31-A because it has not been passed for agrarian reforms and, secondly, that the impugned Act includes an area within the definition of 'estate' in the Reforms Act which is not an 'estate' within Art. 31-A(2). He says that the validity of the acquisition under the Reforms Act must be judged in the light of Art. 31 and Art. 19.

Art. 31-A(2) as enacted by Constitution (Seventeenth Amendment) Act, 1964, reads as follows:

"31-A. (2) In this article—

(a) the expression 'estate' shall in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

(i) any *jagir*, *inam* or *muafi* or other similar grant and in the States of Madras and Kerala any *jammam* right;

(ii) any land held under ryotwari settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;

(b) the expression 'right' in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, *raiyyat*, under *raiyyat* or other intermediary and any rights or privileges in respect of land revenue."

It is apparent from the definition that as far as the first part of cl. (a) is concerned, we have to look to the meaning given to the expression "estate" or its local equivalent in an existing law relating to tenures. We cannot have recourse to the meaning given in a law which is not existing law. Existing law is defined in Art. 366(10) thus:

" 'Existing law' means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation."

Therefore, if the State desires to invoke Art. 31-A and rely on the definition contained in the first part of cl. (a) it must show that the area sought to be acquired is an 'estate' within the definition contained in a law relating to land tenures passed before the commencement of the Constitution. The relevant definition for our purposes is contained in s. 4(4) of the U. P. Land Revenue Act, 1901. It is not necessary to decide whether Pargana Agori falls within the definition of 'Mahal' as we have come to the conclusion that Pargana Agori is a *Jagir* or *Inam* or a grant of a similar nature within cl. (a)

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(i) of Art. 31-A(2). But before giving our reasons for this conclusion we will dispose of the contention of the learned counsel that Pargazia Agori is an estate within cl. (a)(iii) of that Article. According to the learned counsel for the State any waste land or forest land would fall within cl. (a) (iii). He says that it is not necessary that it should be held or let for purposes of agriculture or for purposes ancillary thereto. In other words, he would re-write cl. (a) (iii) as follows:

Cl. (a) (iii)—

(A) any land held or let for purposes of agriculture or for purposes ancillary thereto,

(B) any waste land, forest land, land for pasture,

(C) sites of building and other structures occupied by cultivators of land, agricultural labourers and village artisan.

We are unable to read cl. (a) (iii) in this way. It seems to us that if this was the intention, cl. (a) (iii) would have been split up and wasteland, forest land and land for pasture would have figured separately in a separate clause. There are vast areas of forest land and waste land in India and it is not to be expected that these would be included in the definition indirectly by expanding the word 'land'. If this was the intention at least the word 'including' would have been omitted and substituted by 'any'. Further the whole object of Art. 31-A is to carry out agrarian reforms and it is difficult to see how agrarian reforms can be furthered by the acquisition of every parcel of forest land or waste land.

In our opinion the word 'including' is intended to clarify or explain the concept of land held or let for purposes ancillary to agriculture. The idea seems to be to remove any doubts on the point whether waste land or

forest land could be held to be capable of being held or let for purposes ancillary to agriculture.

We must, therefore, hold that forest land or waste land in the area in dispute cannot be deemed to be an estate within cl. (a) (iii) unless it was held or let for purposes ancillary to agriculture. There is no dispute that the cultivated portion of Pargana Agori would fall within cl. (a) (iii).

The next point is whether Pargana Agori is a *Jagir*, *Inam* or other similar grant within Art. 31-A(2)(a)(i). The learned counsel for the State relies on the following facts.

About the year 1744 A. D. Shambu Shah the then Raja of Agori was dispossessed of his domains by Raja Balwant Singh and he brought the estate to his own use. It appears from Robert's report that Raja Balwant Singh and his successor Chet Singh remained in possession for about 40 years. During the insurrection of Chet Singh, Adil Shah, grandson of Shambu Shah, attended on Warren Hastings and made himself so useful that the Governor-General gave him a *sanad* restoring him the Zamindari of Agori Barhar (*vide* Sherring Hindu Tribes Caste. Vol. I. pages 182-183) reproduced in *Bajinath Prasad Singh v. Tej Bali Singh* (1). He helped the British in the military operations against Chet Singh thus:

"Meanwhile the information of Chet Singh's flight reached the Governor-General at Chunar and a strong force was sent under Major Popham to take possession of Latifpur and then to reduce Bijaigarh. The Governor-General, after visiting Patita, returned to Ramnagar on September 28th and after restoring confidence by the issue of proclamations of amnesty, formally installed Mahip Narayan Singh, the daughter's son of Balwant Singh, as

(1) A.I.R. 1917 All. 191.

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successor to Chet Singh. Major Popham and his forces reached Latifpur without opposition and having garrisoned the place with two companies of sepoy under Captain Palmer, proceeded towards Bijaigarh, which he reached after a difficult and trying march. A survey of the height of the fort immediately dispelled all idea of capturing it by escalade. But the Raja of Agori, who had been expelled by Balwant Singh and was now seeking restoration to his ancestral domains, pointed out that the adjoining hill of Lowa Koh commanded the fort and was undefended. Accordingly a battery was at once thrown up on Lowa Koh, as also on another hill to the north of the fort. On the following day fire was opened from these batteries and resulted in the speedy silencing of the guns of the enemy, which were very ineffectively served." (*vide* District Gazetteer of Mirzapur—page 237).

The sanad is dated October 9, 1781, and the translation reads as follows:

"Be it known to Azzat Asar (respected) Adal Singh, Zamindar Pargana Agori.

That on the basis of his application it has been learnt that the Zamindari of the aforesaid Pargana is his ancient hereditary property and that some years ago Raja Balwant Singh forcibly dispossessed him therefrom and himself took possession thereof. Therefore, in view of Bargadam Haqeeq, he should be restored to his own rights so that he may carry on the settling and management of the aforesaid Pargana under the authority of the Amil and Rafat Wa Awali Martabat Raja Mahip Narain Bhadur (?). It be considered as very urgent and be complied with accordingly. Dated the 20th of Shawalul Mukarram, 1195 Hijri Qudsi, corresponding to the 9th of October, 1781, A. D. Qalmi."

Another translation appears in *Baijnath Prasad Singh v. Tej Bali Singh* (1):

"Be it known to Adil Shah, respectable zamindar of Pargana Agori, that on a petition having been made, it is known that the zamindari in the pergana aforesaid is his old ancestral property. Several years ago Raja Balwant Singh forcibly dispossessed him and brought it to his use. Therefore, in lieu of former rights he should remain in proprietary possession of his share as heretofore. He should make arrangements as regards the cultivation of the land and population of the pergana aforesaid in accordance with the directions of the Revenue Officer and Raja Mohit Narain Bahadur of high rank. He is insisted on doing as directed above."

On 15th, October, 1781, a sanad was granted to the petitioner's ancestor Adil Shah granting him an Ultmagah Jagir of Rs. 8,001 from Fasli year 1189. Adil Shah obtained possession of the Pargana with the assistance of the British troops.

On 4th November, 1803, a sanad was granted to the petitioner's ancestors granting a Jagir of Rs. 8,001 per annum.

Mr. A. K. Sen contends that the sanad was set aside by resolution of the Governor-General in Council dated April 1788 (*see* paragraph 16 of the G. O. no. 3824 of August 30, 1845 printed on page 97 of the Thomson Despatches). He relies on this statement contained in the judgment of the High Court in Writ Petition No. 454/1955, dated November 2, 1962. But this statement refers to the sanad dated 15th October, 1781, and not to the sanad dated October 9, 1781, or the later sanad dated November 4, 1803. It appears from the District Gazetteer (page 255) that as soon as Adil Shah obtained

(1) A.I.R. 1917 All. 191.

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possession of the zamindari, Adil Shah really forfeited his claim to the assigned villages, the revenue of which was Rs.8,001 and as possession had been obtained at the time of the general settlement in 1788 the Governor-General in Council ordered the assignment to be resumed. Adil Shah died in 1794 and the New Raja became involved in monetary difficulties. Mr. Barton, the then Collector, made certain proposals and they were accepted at Calcutta and orders were issued to him to revise the assessment of Agori-Barhar in such a way as to give the Raja a net profit of Rs.8,001 per annum or to allot him, in lieu thereof, a certain number of villages assessed to that amount. Accordingly the revision of certain revenue paying villages took place, and in addition to the villages assigned by Mr. Duncan, certain others assessed to a sum of Rs.4,000 were made over to the Raja. This arrangement brought taluqas Agori and Singrauli into the Raja's possession, with the result that he became in 1804 both zamindar and jagirdar, or assignee of the Government demand, in taluqas Kon and Agori, Singrauli and 28 villages in Barhar. Paras 11 to 15 of Robert's report dated 1st January, 1847, are to the same effect.

It seems to us clear from the above facts that Pargana Agori is still held under the sanad dated 9th October, 1781, and the sanad dated 4th November, 1803. The second sanad is a grant of land revenue. That is definitely a jagir.

The learned counsel for the State contends that the fact that Adil Shah asserted a prior title may have been one of the reasons for the restoration of the zamindari, but it was in essence a new grant made on political considerations. He further points out that conditions are also laid down in the sanad. Adil Shah was enjoined to make arrangements regarding cultivation and

population of the pargana and had to obey the directions of the revenue officer and Raja Mohit Narain Bahadur in this behalf.

As stated by this Court in *Thakur Amar Singhji v. State of Rajasthan* (1) "we do not find any sufficient ground for putting a restricted meaning on the word 'Jagir' in Art. 31-A. At the time of the enactment of that Article the word had nearly acquired both in popular usage and legislative practice a wide connotation, and it will be in accord with sound canons of interpretation to ascribe that connotation to that word rather than an archaic meaning to be gathered from a study of ancient tenures."

An *inam* is explained in Wilson's Glossary thus:

"A gift, a benefaction in general, a gift by a superior to an inferior. In India, and especially in the south, and amongst the Marathas, the term was especially applied to grants of land held rent-free and in hereditary and perpetual occupation; the tenure came in time to be qualified by the reservation of a portion of the assessable revenue, or by the exaction of all proceeds exceeding the intended value of the original assignment; the term was also vaguely applied to grants of rent-free land, without reference to perpetuity or any specified conditions. The grants are also distinguishable by their origin from the ruling authorities, or from the village communities and are again distinguishable by peculiar reservations, or by their being applicable to different objects."

In our opinion a grant by the British of lands for services rendered to them would be a grant falling within cl. a(i).

It seems to us that on the facts of the case the grant was in the nature of a grant similar to a Jagir or inam.

(1) [1955] 2 S.C.R. 303.

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The fact that Balwant Singh and Chet Singh held possession of this Pargana for 40 years cannot be ignored. This shows that to all intents and purposes Adil Shah had lost the pargana and it was in effect a fresh grant in the nature of Jagir or inam for services rendered to the British. Adil Shah's assertion to title had not been verified. Although it may be one of the reasons for the grant, it is clear that if it had not been for the grant and its enforcement by the British troops Adil Shah would not have been able to recover the possession of the Pargana. His title to the pargana would rest on the grant and not the alleged previous title.

If it is held, as we do hold, that the area in dispute is a grant in the nature of Jagir or inam and consequently an estate within Art. 31-A(2), the impugned Act can claim the protection of Art. 31-A. The notifications dated 30th June, 1953, and July 1953, must therefore be upheld.

Mr. A. K. Sen further urges that the acquisition of the estate was not for the purposes of agrarian reforms because hundreds of square miles of forest are sought to be acquired. But as we have held that the area in dispute is a grant in the nature of Jagir or inam, its acquisition like the acquisition of all Jagirs, inams, or similar grants, was a necessary step in the implementation of the agrarian reforms and was clearly contemplated in Art. 31-A.

In this view it is not necessary to decide whether the area in dispute is a Mahal or covered by s. 3(8) of the Reforms Act as it existed in 1958 or earlier or any other question which was raised before us.

In the result the appeals filed by the State are accepted, the appeal filed by the petitioner Raja is dismissed and the petition under Art. 226 filed by the Raja is dismissed. In the circumstances of the case there will be no order as to costs.

Ordered accordingly.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Shah and the Hon'ble
Mr. Justice Bhargava

MESSRS. JUGAL KISHORE BALDEO SAHAI ... AP-
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v.

THE COMMISSIONER OF INCOME-TAX, U. P.,
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(ON APPEAL FROM THE HIGH COURT AT
ALLAHABAD)

Income-tax Act, (XI of) 1922, s. 10(2)(XV)—Salary bona fide paid to Karta of the Hindu undivided family for looking after family's business—Whether a permissible deduction as expenditure.

If a remuneration is paid to the Karta of the Hindu undivided family under a valid agreement which is *bona fide* and in the interest of the business of the family and the payment is genuine and not excessive, it would be an expenditure laid out wholly and exclusively for the purpose of the business and must be allowed as an expenditure under s. 10(2) (xv) of the Income Tax Act.

Civil Appeals Nos. 594 to 600 of 1965 from the Judgment and Order dated the 28th March, 1962 of the Allahabad High Court in I. T. Misc. Case No. 424 of 1959.

A. K. Sen (T. A. Ramachandran, and J. B. Dada-
chanji with him) for the Appellant.

S. T. Desai (Gopal Singh and R. N. Sachthey with
him) for the Respondent.

The following Judgment of the Court was delivered
by—

BHARGAVA, J.:—These appeals by special leave are
directed against the judgment of the Allahabad High

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Court returning an answer to the following question referred to it by the Income-tax Appellate Tribunal.

"Whether on the facts and circumstances of the case the salary paid or credited to a *karta* of the family for looking after the family's business was a permissible deduction under s. 10(2)(xv) in computing the income of the family business".

The assessee was a Hindu undivided family carrying on a joint family business of commission agency in cloth under the name of Jugal Kishore Baldeo Sahai and was, in addition, deriving income from some property and from some partnership business in which the *karta* Babu Ram was a partner representing the interest of the Hindu undivided family. The family consisted of Babu Ram, his brother Gobardhandas and their sons. In June, 1946, the *karta* Babu Ram wrote a letter to his brother Gobardhandas, who was the only other adult member of the family, stating that, since he was managing all the business, he ought to get to salary of Rs.1,000 per month. Gobardhandas promptly agreed to this proposal and consequently in the account books of the family for the year in question a sum of Rs.12,000 was debited in the expense account of the Hindu undivided family business, viz., of Jugal Kishore Baldeo Sahai and the same amount was credited in the name of Babu Ram as an individual. The first such credit was made in the account year relevant to the assessment year 1946-47 and similar credits continued to be made in subsequent accounting years up to the year relevant to the assessment year 1952-53. Thus, the debit against the Hindu family business at the rate of Rs. 12,000 per year and similar credit in the name of Babu Ram was made in the accounts for seven years. In each of these seven years the Hindu undivided family as the assessee claimed that this sum of Rs.12,000

every year should be deducted as an expenditure under s. 10(2)(xv) of the Income-tax Act. The Income-tax Officer rejected the claim and that order was upheld by the Appellate Assistant Commissioner as well as by the Tribunal. Thereupon, at the request of the assessee appellant, the question reproduced by us was referred by the Tribunal for the opinion of the High Court. The High Court answered the question against the appellant and upheld the view of the Tribunal. Consequently, these appeals have been brought up before us.

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The High Court has taken the view that under the Hindu Law, a *karta* is bound by reason of his being the *karta* to manage all the business of the family without being entitled to any remuneration for the service of management. It went on to comment that indeed, when under the law a *karta* represents the family, it would be anomalous to think of a *karta* as being an employee of himself or being entitled to remuneration for acting as such and receiving payment from his own-self. This view was expressed by the High Court on the basis of its opinion about the rights and duties of a *karta* of a Hindu undivided family under the Hindu Law and to arrive at this view, the court relied on a comment in Gopalchandra Sarkar Sastri's Hindu Law, 1940 Edn., N. E. Raghavachariar's Hindu Law, 4th Edn., and Mayne's Hindu Law, 11th Edn., and in addition, on a decision of the Madras High Court in *Krishnasami Ayyangar v. Rajagopala Ayyangar* (1). It was on the basis of these comments in the books of Hindu Law that the Allahabad High Court held the view that Babu Ram, being the *karta* of the family, was not entitled to draw any remuneration for carrying on the business of the Hindu undivided family.

(1) 44 I.T.R. 887.

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The decision of the Madras High Court and the views expressed by these commentators do not show that a *karta* of a Hindu undivided family is not entitled to charge for services rendered to the family business under any circumstances at all. The right to receive remuneration is negatived with some qualifications. Either it is stated that no remuneration is payable except under special arrangement, or a scope for payment is recognised by saying that the manager or *karta* is not "ordinarily" entitled to remuneration. The Madras High Court in the case of *Krishnasami Ayyangar v. Rajagopala Ayyangar* held that "the managing coparcener was not entitled to special remuneration in the absence of a valid special agreement". We are unable to understand the meaning of the expression "valid special agreement". It is, of course, necessary that before a *karta* receives remuneration, it should be under a valid agreement. In judging what is a valid or proper agreement which would justify the payment of remuneration paid to a *karta* of the Hindu undivided family for managing the business of the family to be deductible as an expenditure under s. 10(2)(xv) of the Income-tax Act, the test, we think, which should be applied, is whether the agreement has been made by or on behalf of all the members of the Hindu undivided family and whether it was in the interest of the business of the family, so that it could be justified on grounds of commercial expediency. That is the test which has always to be applied when considering whether a particular expenditure claimed as a deduction under s. 10(2)(xv) of the Income-tax Act has been incurred wholly and exclusively for the purpose of the business.

This Court in *Jitmal Bhuramal v. Commissioner of Income-tax, Bihar and Orissa* (1) has already held that

(1) 44 I.T.R. 887.

"a Hindu undivided family can be allowed to deduct salary paid to a member of the family, if the payment is made as a matter of commercial or business expediency." Mr. S. T. Desai, learned counsel appearing for the department tried to distinguish that case on the ground that in that case the salaries which were held to be deductible were paid to junior members of the family and not to the *karta*. The view expressed by this Court was in general terms and did not make any distinction between a junior member of the family or a *karta*. The principle was laid down by this Court without any such distinction even though the Court was then concerned with salaries which had been paid to junior members of the family.

We do not consider that the decision given by this Court in that case needs to be given a narrow interpretation so as to confine the right of deducting the remuneration paid by a Hindu undivided family to junior members only. There seems to be no reason at all why if a *karta* is paid remuneration he should be in a position different from that of any junior member. It is true that a *karta* has a right to manage the property of the Hindu undivided family on behalf of all the coparceners but there is no obligation or duty on him to carry on a particular business of the family. It is well-established that any member of a Hindu undivided family including a *karta* can have a separate personal source of income if that income is earned independently of the Hindu undivided family assets or business. It is primarily on this basis that it has been held that salary or remuneration paid to the junior member of the family for services rendered to the family business becomes his separate income and consequently a deductible expenditure under s. 10(2)(xv) of the Act when computing the income of the family. In similar circumstances, if a *karta* offers his services to the family instead of choosing

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an independent career to earn his separate income and receives remuneration from the family, there is no reason why the remuneration so paid to him cannot be treated as an expenditure for carrying on the business of the family and consequently expended wholly and exclusively for the purpose of the business and deductible under s. 10(2)(xv) of the Act.

As we have already indicated above, the general view expressed by commentators on Hindu Law as well as in decided cases is that even the *karta* of a family can be paid remuneration for carrying on family business, provided it is under some agreement. There seems to be no reason why, if all persons competent in a Hindu undivided family to enter into an agreement on its behalf consider it appropriate that the *karta* should be paid remuneration and enter into an agreement to pay remuneration to him, that remuneration should not be held to be an expenditure incurred in the interest of the family and consequently an expenditure deductible under s. 10(2)(xv) of the Act. In the present case, Babu Ram received remuneration when he and his brother Gobardhandas agreed that such remuneration should be payable. The other members of the Hindu undivided family were minor sons of Babu Ram himself or of Gobardhandas. Babu Ram and Gobardhandas, being the only two members of the family competent to act on behalf of the family including the minors, entered into this agreement, obviously because it was considered in the interest of the family that Babu Ram should receive this payment. We are not at all impressed by the argument urged on behalf of the department that, since some of the coparceners were minors, no valid agreement at all on their behalf could have been entered into by Babu Ram or Gobardhandas so as to allow payment of remuneration to the *karta*, Babu Ram. The minor sons of

Babu Ram could certainly be represented by himself and the minor sons of Gobardhandas could either be represented by him, being his sons, or, in the alternative, Babu Ram could represent them in the agreement as the *karta* of the family to which they belonged. It is true that under the agreement, some payment was to be made out of the income of the family to Babu Ram so as to become his separate property. But that circumstance would not, in our opinion, invalidate the agreement merely because Babu Ram represented some of the minors on whose behalf the agreement was made. If the agreement is held to be in the interest of the family, the agreement would not be invalidated when executed on behalf of the minors by the person authorised to act on their behalf simply because the minors happened to be represented by a person who receives some benefit under the agreement. The test of the validity of an agreement on behalf of a minor is that it should be for the benefit of the minor, and in this case, there is no finding that the agreement entered into on behalf of the Hindu undivided family including the minors by Babu Ram and Gobardhandas was in any way prejudicial to the interests of the minor members. On the other hand, the facts found show that some of the minors subsequently attained majority and none of them challenged the validity of this agreement on the ground that it had been executed during their minority and that it was against their interest. In fact, it was found that subsequently, when there was a partition in which even the sons of Babu Ram separated from him, the amount to the credit of Babu Ram in the accounts was treated as his separate asset and was not included in the assets of the Hindu undivided family without any objection from any of the members of the family who were minors at the earlier stage when the agreement was entered into. Consequently, we are unable to

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hold that the agreement, by which Babu Ram was allowed this remuneration of Rs.1,000 p.m., was in any way vitiated, and, as we have already held above, it was an agreement executed in the interest of the family.

In our view, if a remuneration is paid to the *karta* of the family under a valid agreement which is *bona fide* and in the interest of, and expedient for, the business of the family and the payment is genuine and not excessive, such remuneration must be held to be an expenditure laid out wholly and exclusively for the purpose of the business of the family and must be allowed as an expenditure under s. 10(2)(xv) of the Act.

In this connection, we may take notice of a decision in the Patna case, *Commissioner of Income-tax, Bihar and Orissa v. Jainarain Jagannath* (1), wherein also it was held that "a member of a joint Hindu family might conceivably do business in his individual capacity and in that capacity might render services to the joint family trading firm in consideration of which the firm might pay him such remuneration as it would pay to an outsider. If such remuneration is not excessive and is reasonable and is not a device to escape income-tax, then it will be a legitimate deduction in computing the profits of the business. If on the other hand, the amount paid is unreasonably high and disproportionate to the services rendered by him, then it may be treated as part of the profits of the firm distributed in a particular manner. In the present case, there is no indication of any finding that the payment to Babu Ram was at all high, or was not commensurate with the services rendered by him.

An alternative ground, on which Mr. Desai on behalf of the department challenged this deduction under s. 20(x) (xv), was that the remuneration was being paid to

(1) 13 I.T.R. 410.

Babu Ram not only to manage the Hindu undivided family business carried on under the name of Jugal Kishore Baldeo Sahai, but also for other businesses, including those of the partnership firms in which Babu Ram was a partner in his own name, though representing the Hindu undivided family. In support of this proposition, learned counsel relied on the decision of the Calcutta High Court in *Jitmal Bhuramal v. Commissioner of Income-tax, Bihar and Orissa* (1), which judgment was affirmed by this Court as reported in *Jitmal Bhuramal v. Commissioner of Income-tax, Bihar and Orissa* (2). In that case, there was a finding of fact that two junior members of the Hindu undivided family, Gulzarilal and Madanlal, were employed in the partnership business in which the *karta* of the family was a partner and had rendered services to that business. This Court, while recognising the principle that "a Hindu undivided family is allowed to deduct salaries paid to members of the family, if the payment is made as a matter of commercial or business expediency", laid down the exception that the services rendered must be to the family. It was held that, since the services had been rendered not to the family, but to the partnership firm, the remuneration paid to those members was not a legitimate deduction under s. 10(2) (xv) from the income of the Hindu undivided family, and that it could be a valid deduction only when computing the income of the partnership business.

It is true that in the case before us the statement of the case mentions that the agreement for payment of remuneration to Babu Ram was to the effect that he was to get Rs.1,000 p.m. for looking after the business of the Hindu undivided family. It is because of the use of the word "businesses" in the plural that learned counsel urged that the remuneration given to Babu Ram was

(1) 44 I.T.R. 887.

(2) 37 I.T.R. 528.

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not merely for looking after the Hindu undivided family business, but also for rendering services to the partnership firms in which Babu Ram was a partner. We do not consider that this interpretation of the agreement is correct. The agreement does not envisage any payment to Babu Ram for services rendered to the partnership firms. The language used was that Babu Ram should receive the remuneration for managing all the business of the Hindu undivided family, which can only mean that he was to manage the affairs of the Hindu undivided family firm and also to look after the interests of the Hindu undivided family in other businesses. Thus, the remuneration was not intended to cover any services rendered by him to the partnership firms apart from whatever he was required to do in the capacity of looking after and managing the affairs of the Hindu undivided family. The principle laid down in the case of *Jitmal Bhuramal v. Commissioner of Income-tax, Bihar and Orissa* (1) is, therefore, not applicable to the case before us.

The appeals are consequently allowed. The judgment of the High Court is set aside and the question referred by the Income-tax Appellate Tribunal is answered in the affirmative. The appellant will be entitled to its costs in this Court as well as in the High Court.

Appeal allowed.

(1) 44 I.T.R. 887.

APPELLATE CIVIL

Before Mr. Justice Jagdish Sahai and Mr. Justice Broome

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U. P. Consolidation of Holdings Act, V of 1954, ss. 9, 10 and 11(1)—Order condoning delay in filing objections—If covered by ss. 9 and 10 and appealable—Indian Limitation Act, 1908, s. 5.

The order referred to in s. 10 is an order on the merits of the controversy between the parties, so, also s. 9 contemplates an order passed in respect of the objections mentioned in the section. Proceedings on an application under s. 5 of the Limitation Act are separate from those under ss. 9 and 10 and these sections or s. 11 do not refer to an order passed on an application under s. 5 of the Limitation Act. Therefore, an order passed on such an application was not appealable.

Special Appeal No. 485 of 1966 against the order of G. C. MATHUR, J. in Civil Miscellaneous Writ No. 1904 of 1963 decided on 29th April, 1966.

Sripat Narain Singh, for the Appellant.

The following judgment of the Court was delivered by—

JAGDISH SAHAI, J.:—This special appeal is directed against the judgment of G. C. MATHUR, J., dated 29th April, 1966, dismissing Writ Petition No. 1904 of 1963, filed by the petitioner Sambharoo.

The respondents 5 to 7 had filed objections under s. 9(1) of the Consolidation of Holdings Act (hereinafter called the Act). The objections were filed beyond time. The aforesaid respondents therefore made an application under s. 5 of the Limitation Act for condoning the delay. The Consolidation Officer condoned the delay by his order dated 29th September, 1962. Against the

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order condoning the delay the petitioner appealed under s. 11(1) of the Act. This appeal was allowed by the Settlement Officer (Consolidation) and the order of the Consolidation Officer condoning the delay was set aside. Thereupon the respondents 5 to 7 filed a second appeal under s. 11(2) of the Act. The Deputy Director of Consolidation, holding that no appeal lay against the order of the Consolidation Officer, allowed the second appeal and restored the order of the Consolidation Officer. The petitioner then made an application under s. 48 of the Act to the Director of Consolidation to revise the order of the Deputy Director of Consolidation. That revision application was dismissed by the Director of Consolidation. Thereafter the writ petition giving rise to this special appeal was filed in this Court.

The only submission that was made before G. C. MATHUR, J. was that the view of the Deputy Director of Consolidation and of the Director of Consolidation that no appeal lay against the order of the Consolidation Officer allowing the application under s. 5 of the Indian Limitation Act is incorrect. The learned single Judge rejected the submission made on behalf of the petitioner-appellant and dismissed the writ petition.

S. 11 of the Act reads:

"11(1) Any person aggrieved by the order of the Assistant Consolidation Officer under s. 9 or the Consolidation Officer under s. 10, as the case may be, may, within twenty-one days of the date of the order, file an appeal before the Settlement Officer (Consolidation) who shall, after affording opportunity for hearing to the parties concerned, give his decision thereon, which shall, except as otherwise provided in sub-s. (2), be final and not questioned in any court of law."

The only question that calls for consideration is whether an order allowing an application under s. 5 of the Limitation Act would be an order under s. 9 or s. 10 of the Act.

S. 10 of the Act reads:

"10. The annual register shall be revised on the basis of the orders passed under sub-s. (1) and sub-s.(2) of s. 9-A. It shall thereafter be prepared in the form prescribed and published in the unit.

(2) Where any entry in the annual register, published under sub-s. (1), is modified in pursuance of an order passed under this Act or under any other law, a reference to the order along with an extract of its operative portion shall be noted against the said entry."

The order referred to in this section is the order modifying or refusing to modifying an entry, in other words an order on the merits of the controversy between the parties and not an interlocutory order. The order passed in respect of an application under s. 5 of the Indian Limitation Act cannot be an order under s. 10 of the Act.

S. 9 reads:

"9. Issue of extracts from records and statements and publication of records mentioned in ss. 8 and 8-A and the issue of notices for inviting objections—

(1) Upon the preparation of the records and the statements mentioned in ss. 8, 8-A, the Assistant Consolidation Officer shall—

(a) correct the clerical mistakes, if any, and send, or cause to be sent, to the tenure-holders concerned and other persons interested, notices containing relevant extracts from the

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current annual register and such other records as may be prescribed showing—

(i) their rights in and liabilities in relation to the land;

(ii) mistakes and disputes discovered under s. 8 in respect thereof;

(iii) specific shares of individual tenure-holders in joint holdings for the purpose of effecting partitions, where necessary, to ensure proper consolidation;

(iv) valuation of the plots; and

(v) valuation of trees, wells and other improvements for calculating compensation therefor and its apportionment amongst owners, if there be more owners than one;

(b) publish in the unit the current khasra and the current annual register, the khasra chakbandi, the Statement of Principles prepared under s. 8-A, and any other records that may be prescribed to show, *inter alia*, the particulars referred to in cl. (a).

(2) Any person to whom a notice under sub-s. (1) has been sent, or any other person interested may, within 21 days of the receipt of notice, or of the publication under sub-s. (1), as the case may be, file, before the Assistant Consolidation Officer, *objections in respect thereof disputing the correctness or nature of the entries in the records or in the extracts furnished therefrom, or in the Statement of Principles, or the need for partition.*"

It is clear from a perusal of s. 9(2) of the Act that the objections contemplated by that provision are in respect of either the correctness or the nature of the en-

tries in the records or in the extracts furnished therefrom, or in the Statement of Principles, or in respect of the need for partition and not in respect of any other matter, including whether an application under s. 5 of the Limitation Act should or should not be allowed. Consequently when s. 11 of the Act spoke of an order under s. 9 of the Act, it contemplated an order passed in respect of the objections mentioned in that section and referred to above by us.

The proceedings started on an application under s. 5 of the Indian Limitation Act are separate proceedings from those under s. 9 or s. 10 of the Act. It is only after an application under s. 5 of the Limitation Act is allowed that an objection can be entertained. In other words the proceedings started on an application under s. 5 of the Indian Limitation Act have to precede those relating to the objections. It is true that the application under s. 5 is made for entertaining a time-barred objection, but that does not mean that that is an application made under s. 9 or 10 of the Act or that an order passed on it is an order passed under s. 9 or 10 of the Act. That is an application only for permission to invoke the provisions of ss. 9 and 10 of the Act. It is a proceeding which is fully concluded before the actual proceedings under s. 9 or 10 are started. There is no reference to an order passed in respect of an application made under s. 5 of the Indian Limitation Act either in s. 9 or s. 10 or s. 11 of the Act. Under these circumstances, we are satisfied that the view taken by the learned single Judge is correct and does not require any interference.

The appeal has no merits and is accordingly rejected

Appeal dismissed.

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U. P. Municipalities Act, 1916, ss. 40(1)(a)(2)(4)(6), 87-A, 113 (1)(2) and 303(b)—*Three consecutive months in s. 40(1)(a)—Computation and meaning of—Refers to calendar month—Opportunity of explanation in s. 40(4)—Import and meaning—What constitutes—Authority who is to give—Service of notice under—Mode—Order not in compliance with s. 40(1)(a)—If a nullity—Scope of sub-s. (1) and (2) of s. 113 if distinct—U. P. General Clauses Act, 1904, s. 4(28).*

The word 'month' in s. 40(1)(a) means calendar month. The period of three consecutive months commences from the first meeting from which the member absented himself. The three consecutive months refers to the period during which the meetings were held, commencing with the first meeting from which the member absented himself and ending with the last meeting from which he was absent.

The opportunity for explanation contemplated under s. 40(4) is both for the charge of absence, and, in the event of being established for the proposed punishment. If the latter is omitted the notice would not be in compliance with the provision and the order of punishment would be invalid. The provision of s. 40(4) is mandatory. An order passed without giving the opportunity for explanation would be a nullity.

The provision of the two sub-ss. (1) and (2) of s. 113 are distinct in nature and altogether different in object. The doctrine of 'de facto title' embodied in sub-s. (2) cannot be recognised as embodied in sub-s. (1).

Whether the mode of service in s. 303(b) applies to notice in s. 40(4) was doubted.

Special Appeal No. 511 of 1965 connected with Special Appeals Nos. 512, 566 and 567 of 1966 against the order and judgment of G. C. MATHUR, J. in Civil Miscellaneous Writ No. 2179 of 1966 decided on 19th August, 1966.

S. C. Khare, for the Appellant.

The following judgment of the Court was delivered by—

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PATHAK, J.:—The Municipal Board of Maunath Bhanjan in the district of Azamgarh consists of the President and twenty elected members. Written notice of the intention to make a motion of non-confidence against the appellant Abdul Latif Nomani, President of the Board, was presented to the District Magistrate, Azamgarh, on 30th May, 1966, and the District Magistrate convened a meeting on 3rd July, 1966, for consideration of the motion. Notice of the meeting was despatched to the members of the Board by registered post on 31st May, 1966. It appears that on 10th June, 1966, the Commissioner of the Gorakhpur Division issued a notice to Sanaullah Sardar and Mohammad Yusuf, two members of the Board, purporting to charge them with absence from four consecutive meetings of the Board on different dates without obtaining the sanction of the Board and calling upon them to enter a statement of their defence by 26th June, 1966. On 1st July, 1966, the Commissioner made an order removing Sanaullah Sardar and Mohammad Yusuf from membership of the Board. The meeting for consideration of the motion of non-confidence was held on 3rd July, 1966. It was presided over by Sri B. N. Misra, Additional Civil Judge. Eleven members of the Board, including Sanaullah Sardar and Mohammad Yusuf, who had signed the notice of intention to make the motion, were present. Upon examination of the members' list, the judicial officer discovered that Sanaullah Sardar and Mohammad Yusuf were not shown therein and, thereupon, he directed them to leave the meeting. They made an application to the judicial officer urging that they had not been removed in accordance with law and that effect should not be given

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to the order of the Commissioner and they should be considered as continuing members of the Board. The judicial officer, however, rejected the application. The other members present also requested the judicial officer to permit Sanaullah Sardar and Mohammad Yusuf to participate in the meeting but that request was also turned down. Then the judicial officer declared that the meeting could not be held for want of a quorum and recorded a minute to that effect.

Sanaullah Sardar filed a petition under Art. 226 of the Constitution praying for the quashing of the order of the Commissioner removing him from membership of the Board and of the minute of the judicial officer that the meeting for consideration of the motion of non-confidence could not be held for want of a quorum. He also prayed that the District Magistrate and the judicial officer be directed to hold a meeting of the Board for consideration of the motion of non-confidence on the basis of the notice of intention already delivered.

A similar petition was moved by Mohammad Yusuf praying for like relief.

Both the petitions were disposed of together by G. C. MATHUR, J. He rejected the plea of the petitioners that the order removing them from membership of the Board was made *mala fide*, but he held that the order of removal did not satisfy the provisions of s. 40(1)(a) of the U. P. Municipalities Act and was, therefore, invalid. *En passant* he observed that Sanaullah Sardar and Mohammad Yusuf had not been given an opportunity of explanation as contemplated by s. 40(4). He quashed the orders of removal made by Commissioner on 1st July, 1966. Then, pointing out that but for the invalid orders of removal the petitioners would have participated in the meeting convened for the con-

sideration of the motion of non-confidence and that there would then have been a quorum for holding the meeting, he directed the District Magistrate to reconvene a meeting of the Board for consideration of the motion on the basis of the notice of intention which had already been received by him on 30th May, 1966.

Abdul Latif Nomani has filed Special Appeal No. 511 of 1966 against the order allowing the writ petition filed by Sanaullah Sardar and Special Appeal No. 512 of 1966 against the order allowing the writ petition filed by Mohammad Yusuf. The Commissioner and the District Magistrate have also appealed against the two orders, Special Appeal No. 566 of 1966 being directed against the order in favour of Sanaullah Sardar and Special Appeal No. 567 of 1966 against the order in favour of Mohammad Yusuf.

Mr. M. N. Shukla, appearing for the Commissioner and the District Magistrate, contends that the learned Single Judge has erred in holding that the orders of removal are invalid. He urges that the provisions of s. 40(1)(a) of the U. P. Municipalities Act are satisfied inasmuch as the two members had absented themselves from the meetings of the Board for more than three consecutive months and for more than three consecutive meetings without obtaining sanction from the Board and that they had been afforded adequate opportunity for explanation before action was taken against them.

The relevant provisions of s. 40 read as follows:

"40. *Removal of members*—(1) The State Government in the case of a city, or the Prescribed Authority in any other case, may remove a member of the board on any of the following grounds:

(a) that he has absented himself from the meetings of the Board for more than three consecutive months or three consecutive meet-

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ings whichever is the longer period, without obtaining sanction from the Board:

Provided that the period during which the member was in jail as an under trial, detenue, or as a political prisoner, shall not be taken into account;

* * * *

(4) Provided that when either the State Government or the Prescribed Authority, as the case may be, proposes to take action under the foregoing provisions of this section, an opportunity of explanation shall be given to the member concerned, and when such action is taken, the reasons therefor shall be placed on record.

* * * *

(6) Without prejudice to any of the foregoing powers the State Government or the Prescribed Authority, as the case may be, may, on any of the grounds referred to in sub-s. (1), instead of removing the member, give him a warning or place him under suspension for a specified term not exceeding three months at a time, and any member who has been so suspended shall not, as long as the order of suspension continues to remain in force, be entitled to take part in any proceedings of the board or otherwise perform the duties of a member.

Explanation—The power of administering warning or placing a member under suspension under sub-s. (6) may be exercised either by the State Government or the Prescribed Authority as the case may be, while dealing with the matter originally under sub-s. (1) or

sub-s (3) or by the State Government on appeal under sub-s. (2)".

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In the case of Sanaullah Sardar, the last meeting attended by him was held on 30th September, 1965. Then followed the meetings of 30th October, 1965, 1st November, 1965, 30th November, 1965 and 23rd December, 1965 which he did not attend. He attended the next meeting held on 28th January, 1966. It is clear that he was absent for more than three consecutive meetings. But s. 40(1)(a) requires that a member should absent himself from the meetings of the Board for more than three consecutive months or three consecutive meetings, whichever is the longer period. It is necessary, therefore, to examine also whether the meetings of the Board from which he absented himself covered more than three consecutive months. Mr. Shukla urges that the period should run from 30th September, 1965 and should be considered as extending up to 28th January, 1966, the termini being the last meeting attended before and the first meeting attended after the meetings from which the member was absent. If Mr. Shukla's contention is accepted, it must be held that the member has been absent from the meetings for more than three consecutive months. Upon careful consideration, however, we find no force in the contention. The period of three consecutive months commences from the first meeting from which the member absented himself and, if that be taken as the starting point for computing the period, it seems to us that three consecutive months did not elapse during which Sanaullah Sardar was absent from the meetings of the Board. In taking this view, we are fortified by the decision of WARRINGTON, J. in *Kershaw v. Shoretech Corporation* (1) where, upon comparable language, he held that the absence must be

(1) (1966) 95 Law Times Reports, 65.

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gin to be reckoned on the first-meeting at which the alderman was absent.

Then Mr. *Shukla* says that three consecutive months must mean three consecutive British calendar months, apparently by reference to s. 4(28) of the U. P. General Clauses Act. According to him, the calendar month commences from 1st October, 1965 in which the meeting of 30th October was held, and this would mean that three consecutive months are completed on 31st December, 1965. Here again we must differ from Mr. *Shukla*. The calendar month commenced on 30th October, 1965 and ended on 29th November, 1965. Then followed the next calendar month, commencing 30th November, 1965 and ending 29th December, 1965. Finally, the third calendar month commenced on 30th December, 1965 and ended on 29th January, 1966. We are supported in this view by *South British Fire and Marine Insurance Company v. Brojo Nath Shaha* (1). The question in that case was whether a suit instituted on 15th April, 1907 claiming a sum of money under an insurance policy because of a fire occurring in the night of 14th/15th October, 1906, was within limitation, when the period of limitation was six months as specified in the insurance policy. A Full Bench of the Calcutta High Court, which decided that case, held that the suit was not brought within that period. MACLEAN, C. J. held that the word "month" in the clause must mean "calendar month" and that if it be taken, as it appeared from the evidence, that the fire occurred before the midnight of 14th October, 1906, the suit was not instituted until 15th April, 1907, one day after the expiration of six months. It is apparent that the computation can be explained only on the basis that, excluding the day on which the fire occurred, the first calendar month commenced from 15th October, 1906, and the period of six months ex-

(1) I.L.R. 36 Cal. 516 at pp. 535 and 536.

pired, therefore, on 14th April, 1907. In our opinion, it is not established that Sanaullah Sardar absented himself from the meetings of the Board for more than three consecutive months. There is no dispute that he was absent for more than three consecutive meetings, but the period during which the four meetings from which he was absent were held does not exceed three months and of the two this latter period is relevant because, it is plain, it is longer than the period during which three consecutive meetings, from which he absented himself, were held. We find that the order removing Sanaullah Sardar clearly contravenes s. 40(1)(a).

In the case of Mohammad Yusuf, the particulars are that he attended the meeting of the Board held on 23rd December, 1965 and was then absent from the meetings of 28th January, 1966, 5th February, 1966 and 19th February, 1966. It is disputed whether he attended the meeting of 15th March, 1966. Then followed the meeting of 20th May, 1966 which he attended. Now, admittedly Mohammad Yusuf absented himself from three consecutive meetings without obtaining sanction from the Board. The question is whether he absented himself from the meetings for more than three consecutive months. On the principle adopted by us, the period of three months must be computed from 28th January, 1966. Whether he did or did not attend the meeting of 15th March, 1966 is disputed between the parties, and as the material before us is inadequate for the purpose of holding that Mohammad Yusuf did in fact attend that meeting we take it that he absented himself from the meeting of 15th March, 1966. S. 40(1)(a) contemplates an absence from the meetings of the Board for more than three consecutive months. This, as we have held, refers to

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the period during which the meetings in question were held, commencing with the first meeting from which the member absented himself and ending with the last meeting from which he was absent. Measured by this rule, the period of three months, commencing from 28th January, 1966 did not expire when the last meeting of 15th March, 1966 was held. It must, therefore, be held that Mohammad Yusuf, although absent from three consecutive meetings, did not absent himself from the meetings for more than three consecutive months. Since the latter period of absence is the longer, it is apparent that the order removing Mohammad Yusuf is also not in accord with s. 40(1)(a).

In our judgment, the orders removing Sanaullah Sardar and Mohammad Yusuf did not satisfy the provisions of s. 40(1)(a), and we hold that those orders are invalid.

We are of opinion that the orders of removal are invalid also because the notices requiring the two members to submit their explanation did not specify the action which the Commissioner proposed to take against them in case it was found that they had absented themselves from the meetings of the Board. The two notices merely point out that they had absented themselves from certain meetings specified in the notices without obtaining sanction from the Board, and call upon them to enter their defence in reply to that charge. There is nothing in the notices to indicate what is the action proposed to be taken against them.

S. 40(4) requires that when the State Government or the Prescribed Authority proposes to take action, an opportunity of explanation shall be given to the member concerned. The action proposed may be one of removal or of suspension or of warning. We refer to s. 40(6) and the Explanation appended to it. It is

against such action that the statute contemplates an opportunity of explanation, and at that stage it is open to the member concerned to explain why he cannot be found guilty of the charge of absence contemplated by s. 40(1)(a) and also, in the event of his being found guilty of the charge, why he should not be removed or suspended or even warned. That the Legislature intended an opportunity of "explanation" to include both these opportunities, of meeting the charge and of questioning the proposed measure of punishment, is apparent if reference be had to s. 48 which provides for removal of the President. Sub-s. (2) requires that the President must be allowed to show cause against his removal, and sub-s. (2-A) contemplates an "explanation" by the President by way of showing such cause. Provisions analogous to s. 40(4) will be found in ss. 30 and 35.

We hold that the notices dated June 10, 1966 issued by the Commissioner are not in accordance with law, that there was no compliance with s. 40(4) and therefore also the orders of removal are invalid.

In passing, we may also advert to the legality of the mode by which service of the aforesaid notices is said to have been effected. It is pointed out by Mr. *Shukla* that service was effected by the modes set out in s. 303 (b). Assuming that s. 303 refers to such notices, it seems to us upon the facts of the case before us that recourse to those modes was not permissible. The Prescribed Authority was selected by the Statute to take action against a member under s. 40(1), and under s. 40(4) it is that authority which must give an opportunity of explanation to the member concerned. The Commissioner, in the instant case, directed the District Magistrate to arrange to effect personal service upon the two members. As it transpired, that was not

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found possible. It seems the District Magistrate on his own directed the Tahsildar to effect substituted service by the modes specified in s. 303(b), and service was effected accordingly. It does not appear that recourse was had to s. 303(b) at the instance of the Commissioner. We express serious doubt upon the validity of such service.

However, as we have found that the orders of removal contravene s. 40(1)(a) and s. 40(4), we find it unnecessary to express any opinion on the question whether the notices dated June 10, 1966 were served upon the two members in fact and in law.

Mr. L. P. Naithani, on behalf of the respondents, attempted to establish that the Commissioner and the District Magistrate acted *mala fide*, and that the Commissioner in particular was so prompted that he was interested in ensuring that the motion of non-confidence was defeated and had, therefore, passed the orders removing the two members. We have examined the material on the record and we are not satisfied that there is substance in the contention. The Commissioner, it is possible, may have taken the proceedings that he did because it appeared to him that the two members were evading service of the notices issued under s. 40(4), and in order to ensure that any further attempt on their part in that behalf was defeated he proceeded with some expedition in the matter. But we are unable to endorse the finding of the learned Single Judge that thereby he laid himself open to the charge of being interested in the President and in seeing that the motion of non-confidence was defeated. We cannot, upon the material before us, spell out any such motive from the conduct of the Commissioner or of the District Magistrate.

Mr. S. G. Khare, who appears on behalf of Abdul Latif Nomani, states that in the special appeals filed

by Nomani he does not contend that the order of the Commissioner removing Sanaullah Sardar and Mohammad Yusuf from membership of the Board is a valid order. He does not pray for relief against the order of the learned Single Judge quashing the orders of removal. He contends that even if it be taken that the orders of removal are invalid, the learned Single Judge was in error in directing the District Magistrate to reconvene a meeting of the Board for consideration of the motion of non-confidence. He urges that the judicial officer was bound by the order of the Commissioner removing the two members and that he was acting in accordance with law when he denied them participation in the meeting.

Now it appears to us that upon the grounds upon which we have found the orders of removal to be invalid they must be treated as null and void. We have held that the orders did not satisfy the conditions contained in s. 40(1)(a). The Commissioner could remove the two members in exercise of the power under s. 40(1)(a) only if the circumstances contemplated by that provision existed. He had no power otherwise to order their removal by reference to that provision. It is a power especially granted by the statute and can be invoked only upon the existence of the conditions mentioned in it. If the conditions exist, the Commissioner is armed with the power. If not, s. 40(1)(a) confers no power at all upon him, and an order made by him is an order without power and totally lacking legal sanction and, therefore, a nullity.

Then we have also held that the notices issued under s. 40(4) did not give to the two members the opportunity of explanation contemplated by that provision. S. 40(4) is a mandatory provision of law, and it is clear that before action is taken under s. 40(1) the Commis-

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sioner is bound to afford an opportunity of explanation to the member concerned. When is an order a nullity has been recently discussed by the Supreme Court in *Ram Swarup v. Shikar Chand* (1), and it seems to us that the cases before us fall within the rule laid down there. A denial of the rule of natural justice requiring a person to be heard before action is taken against him results in a null and void order. That was laid down by the House of Lords, by majority, in *Ridge v. Baldwin* (2) where the Chief Constable of a borough police force had been dismissed without being informed of the charge against him and without being given an opportunity of being heard in his own defence. The decision in that case was referred to with approval by our Supreme Court in *Associated Cement Companies Ltd. v. P. N. Sharma* (3). Indeed, in this country the doctrine has been treated as an integral feature of our legal philosophy, and in *Ebrahim Vazir v. State of Bombay* (4) was recognised by the Supreme Court as involved in the safeguard of constitutional rights.

In our judgment, therefore, the orders of the Commissioner removing Sanaullah Sardar and Mohammad Yusuf are null and void.

Now, if the orders of removal are null and void, Sanaullah Sardar and Mohammad Yusuf must be considered as continuing to be members of the Board and, therefore entitled to participate in the meeting convened for consideration of the motion of non-confidence. We must, in the circumstances, hold that there was a quorum for the meeting and the declaration of the judicial officer to the contrary cannot be sustained. The meeting should have proceeded in accordance with sub-s. (7) of s. 87-A and the provisions following it. Ac-

(1) A.I.R. 1966 S.C. 893, 896.

(3) A.I.R. 1965 S.C. 1595.

(2) (1964) A.C. 40.

(4) A.I.R. 1954 S.C. 229.

cordingly, the minute of the meeting recorded by the judicial officer declaring that the meeting could not be held for want of a quorum is liable to be quashed.

Then Mr. *Khare* relies upon s. 113(1) and says that the removal of Sanaullah Sardar and Mohammad Yusuf, even though invalid, brought about two *defacto* vacancies in the membership of the Board and that such vacancies do not vitiate any proceeding of the Board, including a proceeding under s. 87-A. He urges that the doctrine of "*defecto* title" embodied in s. 113(2) must be recognised as embodied in s. 113(1). We are of opinion that the province of the two sub-sections of section 113 are distinct in nature and altogether different in object. Sub-s. (1) operates to protect the validity of an act or proceeding of the Board or of its committee where the act is done or proceeding taken and it is discovered that there was a vacancy in fact as well as in the contemplation of law in the Board or in the committee. Sub-s. (2) assumes that there was no vacancy in fact, but that a person, who although disqualified or whose election, nomination or appointment was defective, nevertheless under colour of office or title in fact participated in the act or proceeding. Sub-s. (1) deals with a vacancy in fact as well as in law, while sub-s. (2) treats of a vacancy in law but participation in fact. Accordingly, this contention of Mr. *Khare* must be rejected.

Finally, Mr. *Khare* contends that the remedy of the two members lay in a suit for damages and they should have been denied relief upon the petitions under Art. 226. It seems to us that when the fate of the proceeding under s. 87-A depends upon the validity of the orders of removal, to relegate the dispute to a suit for damages would be to frustrate a proceeding which seriously affects the democratic constitution and adminis-

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tration of the Board and in which Sanaullah Sardar and Mohammad Yusuf are only two of many players on the stage.

In the result, we agree with the learned Single Judge in the order made by him, and dismiss this special appeal with costs.

Special Appeal dismissed.

SUPREME COURT

APPELLATE CIVIL

*Before the Hon'ble Mr. Justice Bachawat and the
Hon'ble Mr. Justice Shelat*

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... APPELLANT,

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SHEONATH DAS AND OTHERS ... RESPONDENTS.

(ON APPEAL FROM THE HIGH COURT AT
ALLAHABAD)

U. P. (Temporary) Control of Rent and Eviction Act, (III of) 1947, ss. 7(2) and 7-A—Power of allotment—Whether extends to accommodation 'about to fall vacant'—Occupation from before the allotment—Continuance of, in contravention of allotment order—Liability for,

The power of allotment vested in the District Magistrate under the U. P. Control of Rent and Eviction Act is not limited to accommodation which is or has fallen vacant but covers equally one 'about to fall vacant' and the order of allotment in each case takes effect from the time it is passed so that the powers and liabilities for eviction under s. 7-A of the Act extend equally to the cases of continuance of an occupation from before the passing of the allotment order, the question of the same being in contravention of the allotment order remaining one of fact for determination in each case.

Ramlal v. Shiv Mani Singh (1) disapproved for laying down the broad rule that the continuation after the allotment order of an existing occupation cannot be in contravention of the allotment order.

Civil Appeal No. 2271 of 1966 from the Judgment and Decree dated the 12th February, 1965 of the Allahabad High Court in Second Appeal No. 2862 of 1963.

B. C. Misra, (M. V. Goswami and B. R. G. K. Achar, with him) for the Appellant.

(1) 1962 A.L.J. 240.

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J. P. Goyal and H. K. Puri, for the Respondent No. 1.

The following judgment of the Court was delivered by—

BACHAWAT, J.—The appellant is the tenant and respondents Nos. 2 and 3 are the landlords of a non-residential accommodation in a part of a building in Mohalla Bulanala in the city of Varanasi. Respondent No. 1 is the allottee of the accommodation. Respondent No. 5 is the Assistant Rent Control and Eviction Officer, Varanasi, authorised by the District Magistrate to perform his functions under the U. P. (Temporary) Control of Rent and Eviction Act, 1947 (hereinafter referred to as the Act). On February 11, 1956 the landlords obtained a decree for ejectment of the tenant from the accommodation. As the tenant was about to vacate the accommodation, on 20th February, 1957, respondent No. 5 passed order under s. 7(2) of the Act directing the landlords to let the accommodation to respondent No. 1. On 22nd February, 1957, the landlords and the tenant agreed that the tenant would continue to occupy the accommodation at an enhanced rent and would be liable to eviction in execution of the decree for ejectment in the event of his failing to pay the outstanding arrears of rent in certain stated instalments. As the tenant failed to pay the agreed instalments of rent, on 21st May, 1957, the landlords in execution of the decree for ejectment obtained an order from the executing court for the issue of a warrant for delivery of possession. In the meantime on 23rd February, 1957, proceedings were started against the appellant under s. 7-A (1) of the Act. By an order dated 23rd March, 1957, under s. 7-A(2) respondent No. 5 directed the tenant to vacate the accommodation by 24th March, 1957. By another order dated 2nd December, 1957, under s. 7-A (3) respondent No. 5 directed S. O. P. S. Chowk to evict

the tenant and put the allottee in occupation of the accommodation. The tenant filed a writ petition challenging the orders of respondent No. 5. The writ petition was dismissed and the tenant was relegated to a suit. A special appeal from this order filed by the tenant was also dismissed. On 9th September, 1958, the tenant filed the present suit asking for a declaration that the orders passed by respondent No. 5 were without jurisdiction and for consequential reliefs. The trial court dismissed the suit. The appellate court reversed this decree and decreed the suit. On second appeal, the High Court restored the decree of the trial court and dismissed the suit. The tenant has now filed this appeal by special leave.

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In this appeal the tenant challenges the orders passed by respondent No. 5 under sub-s. (2) of s. 7 and sub-s. (2) and (3) of s. 7-A of the Act. S. 7(2) is in these terms:

- “7. (1)(a).....
(b).....
(c).....

(2) The District Magistrate may by general or special order require a landlord to let or not to let to any person any accommodation which is or has fallen vacant or is about to fall vacant.”

Under s. 7(2), the District Magistrate can pass an order in respect of an accommodation which is or has fallen vacant or is about to fall vacant. The accommodation must either be vacant or about to fall vacant before he can pass the order under s. 7(2). If the accom-

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modation is neither vacant nor about to fall vacant, when the order under s. 7(2) is passed, the order is void and is without jurisdiction.

Counsel for the tenant submitted that the District Magistrate has no power to pass an order of allotment under s. 7(2) unless the accommodation is or has fallen vacant. This submission is based on a misconception. The District Magistrate can pass an order under s. 7(2) not only when the accommodation is or has fallen vacant but also when it is about to fall vacant. On the materials on the record there can be no doubt that the accommodation was about to fall vacant when respondent No. 5 passed the order under s. 7(2). Before passing the order, he issued notices to the landlords and the tenant. On January 5, 1957, the landlords stated before him in writing that the accommodation was about to be vacated by the tenant. On 22nd January, 1957, the tenant stated before him in writing that he was going to leave the accommodation in a month's time. On 12th February, 1957, the tenant again made a statement before him that he wanted to vacate the shop as the decree for ejectment had been passed against him. The declared intention of the tenant that he was about to vacate the accommodation coupled with the decree for ejectment show that on 20th February, 1957, the accommodation was on the point of becoming vacant or was about to fall vacant. As a matter of fact in the court below the appellant did not contend that on 20th February, 1957 the accommodation was not about to fall vacant. His contention was that as the accommodation had not actually fallen vacant, respondent No. 5 had no power to pass the order under s. 7(2).

Counsel next submitted that even though respondent No. 5 might have power to pass an order under s. 7(2)

when the accommodation was about to fall vacant, the order could take effect only when the accommodation fell vacant. We cannot accept this contention. The order dated 20th February, 1957 directed the landlords to let the accommodation to the allottee. Respondent No. 5 had power to pass this order. The order took effect immediately.

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Counsel for the tenant submitted that the proceedings under s. 7-A were without jurisdiction. Now the District Magistrate can take action under s. 7-A "where an order requiring any accommodation to be let or not to let has been duly passed under sub-s. (2) of s. 7 and the District Magistrate believes or has reason to believe that any person has in contravention of the said order, occupied the accommodation or any part thereof". Counsel submitted that as the tenant was in occupation of the accommodation before the passing of the order under s. 7(2), he cannot be said to have occupied the accommodation in contravention of the order. This contention is supported by the decision in *Ram Lal v. Shiv Mani Singh* (1), but we cannot agree with the broad statement in this case that the continuance after the allotment order of an occupation previous to the order cannot be an occupation in contravention of the order. It is a question of fact in each case whether a person in occupation of the accommodation since before the allotment order can be said to have occupied the accommodation in contravention of the order, see *R. K. Khandelwal v. Moti Lal Chawla* (2). In the instant case after the allotment order was passed, the landlords agreed to accept the appellant as a tenant at enhanced rent. This letting and the continuance of occupation by the appellant under it were in direct breach of the allotment order. In the circumstances, the appellant can well be said to have occupied the accom-

(1) 1962 A.L.J. 260.

(2) 1962 A.L.J. 20.

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modation in contravention of the order. The respondent No. 5 had, therefore, jurisdiction to initiate proceedings under sub-s. (1) of s. 7-A and to pass the orders under sub-s. (2) and (3) of s. 7-A. The propriety of this order cannot be questioned in this suit.

The appeal is dismissed. There will be no order as to costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Jagdish Sahai and Mr. Justice
R. Chandra*

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RAFIUDDIN AND OTHERS ... OPPOSITE-PARTIES
RESPONDENTS

U. P. Zamindari Abolition and Land Reforms Act, 1950, Chap. IX-A—Ss. 240-D, 240-J, 330 and 331—Compensation statement prepared under s. 240-D—Appellant's name recorded as sirdar—No objection filed—Consolidation authorities not precluded from deciding that the respondent was sirdar of land—Ss. 330 and 331 do not bar such decision by consolidation authorities;

—S. 240-G—"Persons interested"—meaning of—S. 240-H(b) "involves a question of title"—meaning of.

There is no provision in Chap. IX-A under which an adjudication in respect of *adhivasi* or *sirdar* can be made. Chap. IX-A only deals with the acquisition of the rights of an intermediary or a landlord in respect of his land occupied by *adhivasis* and for payment of compensation to him. It also declares the law that any person, who is an *adhivasi* of such land, shall become *sirdar* thereof, but the machinery for the determination of the question whether a particular person is or is not an *adhivasi* and, therefore, is or is not a *sirdar*, is not contained in Chap. IX-A of the Act, but is contained in ss. 229-B and 234-A of the Act. Further there is nothing in s. 240-D which requires that in a compensation statement an entry giving the names of the various persons who are *adhivasis* and have consequently become *sirdars* should be made, if some names are, in fact entered it is only for the ancillary purpose of showing that it is a land occupied by *adhivasis* and therefore, no finality can be attached to the entry in the compensation statement of a particular name shown as *adhivasi* in respect of a plot of land.

Held, the entry of the name of the appellant as *adhivasi* or *sirdar* in the compensation statement prepared under s. 240-D and which became final under s. 240-J of Z. A. & L. R. Act, was no bar against the consolidation authorities deciding as to whether the appellant or the respondent was the *adhivasi* or *sirdar*

* While Sitting at Lucknow.

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of the plots in dispute. S. 330 or s. 331 of the Act also does not bar the investigation of the question as to who is the *adhivasi* or the *sirdar* of the plots in dispute by the Revenue Courts.

The word "person interested" in s. 240-G, U. P. Z. A. & L. R. Act means person interested in receiving the compensation. There is no provision for the filing of objections by persons claiming to be *adhivasis* or *sirdars* of the land acquired. The expression "involves a question of title" occurring in cl. (b) of s. 240-H of the same Act means, when the question is raised as to who is entitled to receive compensation.

Special Appeal no. 29 of 1965 against the judgment and order dated 25th January, 1966, passed by R. N. SHARMA, J. in Writ Petition no. 263 of 1962.

Facts appear in the judgment.

M. R. Misra, for the Appellant.

K. S. Verma, for the Respondent.

The following judgment of the Court was delivered by—

JAGDISH SAHAL, J.:—In this Special Appeal which is directed against the judgment of R. N. SHARMA, J., dated 25th January, 1965, the following two submissions have been made before us:

(1) That the finding with regard to possession of the respondents over the plots in dispute, by the consolidation authorities not being based on evidence was liable to be quashed and the learned single judge committed an error of law in not doing so.

(2) That the name of the appellant having been recorded as *sirdar* in the compensation statement prepared under s. 240-D of the U. P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as the U. P. Z. A. & L. R. Act) and no objection having been filed the same became final under s. 240-J of the U. P. Z. A. & L. R. Act. The consolidation authorities were therefore precluded from going into that question and holding that not

the appellant but the respondent was the *sirdar* of the land in dispute. No other submission has been made before us.

We proceed to consider the submissions seriatim :

I. No ground has been taken in the memorandum of appeal that the finding that the respondents are in possession over the land in dispute is not based on evidence. It does not also appear from the judgment of the learned single Judge that the point that the findings are based on no evidence was raised before him. In the writ petition also no point with regard to the finding not being based on evidence was taken. It does not also appear to have been taken before the Deputy Director (Consolidation). That being the position, we have not allowed the learned counsel to urge this point before us. The question would require examination of evidence which this Court does not normally do in a proceeding under Art. 226 of the Constitution of India or in an appeal against an order passed by the learned single Judge in a writ petition. We, therefore, overrule the first submission of the learned counsel.

II. Before we come to deal with the second submission of the learned counsel for the appellant, we would like to point out that s. 240-J occurs in Chap. IX-A which was introduced in the principal Act by Uttar Pradesh Land Reforms (Amendment) Act, 1954 (U. P. Act no. 20 of 1954). This chapter is headed as "Conferment of *sirdari* rights on *adhivasi*" and contains 14 sections. The provisions contained in these sections show that they deal with the acquisition of rights, title and interest of landholder in the land held by *adhivasis* and for payment of compensation to him in respect of it. Whereas Chap. II of the U. P. Zamindari Abolition and Land Reforms Act deals with the acquisition of the proprietary rights of an intermediary or a landlord, Chap III of the Act deals with the payment of compensation to

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him in respect of such rights. Chap. IX-A of the Act deals with acquisition of rights of an intermediary or a landlord in respect of the land owned by him and occupied by *adhivasis* and for payment of compensation to him in respect of acquisition of his rights in such land. S. 240-A with which Chap. IX-A opens, provides for the acquisition of rights, title and interest of the landholder in the land held by an *adhivasi*. S. 240-B provides for the consequences that ensue on acquisition of rights, title and interests of a landholder under s. 240-A of the Act. S. 240-C provides that the landholder shall receive compensation in respect of acquisition of his rights, title or interest in the land occupied by *adhivasis*. S. 240-D provides for the preparation of a compensation statement. S. 240-E enjoins as to in what manner compensation shall be paid to the landholder. S. 240-F provides for publication of the compensation statement prepared under s. 240-D. S. 240-G provides for filing of objections. S. 240-H provides for disposal of objections. S. 240-HH provides that if a question of title arises in respect of land occupied by an *adhivasi* in areas under consolidation operation the matter should be referred to the Arbitrator. S. 240-I provides for appeal to the Collector. S. 240-J provides for the publication of the statement. S. 240-K provides for the payment of compensation. S. 240-L provides that the provisions of Chap. IX-A shall not apply to evacuee property and s. 240-M confers on the State Government the power to make rules. These provisions clearly show that the purpose of the provisions contained in the Chap. IX-A is to provide for the acquisition of the rights, title and interest of a landholder in his plots occupied by *adhivasis* and for payment of compensation to him. That chapter does not at all deal with the decision of disputes between persons claiming to be an *adhivasi* or *sirdar* of a plot of land.

S. 240-D reads as follows:

"240-D. *Compensation Statement*—For purposes of assessment and payment of compensation for acquisition of rights, title and interest of the landholder in the land referred to in s. 240-A the Compensation Officer shall prepare a compensation statement showing:

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- (a) the name or names of the landholder;
- (b) where the land referred to in s. 240-A was on the date immediately preceding the date of vesting.
 - (i) recorded as *sir*, *khudasht* or a fixed rate tenancy of the landholder, or
 - (ii) included in the holding of a person belonging to any of the classes mentioned in cl. (d) of s. 18, or
 - (iii) included in the holding of a person belonging to any of the classes mentioned in s. 19.

the rent computed at hereditary rates applicable on the said date;

(c) where the land referred to in s. 240-A was land other than land mentioned in cl. (b), the rent payable for such land by the tenant thereof on the said date; and

(d) such other particulars as may be prescribed."

(*Italicised by us*).

It is clear from this provision that the only purpose for which a compensation statement is prepared is to assess and pay to the intermediary or the landlord compensation for the acquisition of his land occupied by an *adhivasi* or a *sirdar*.

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S. 240-F reads:

"240-F. Preliminary publication of statement—

The compensation statement prepared under s. 240-D shall be published in the manner prescribed and a copy thereof shall also be sent to the landholder concerned."

It would be noticed that no copy is to be sent to any person other than the landlord, not even to one who may claim to be *adhivasi* or *sirdar* of the land acquired. This provision also shows that the purpose of the compensation statement is to assess and pay compensation to the intermediary or the landholder. If the idea was that compensation statement would record the rights or the status of persons claiming to be *adhivasis* or *sirdars* of the land acquired a copy of this compensation statement would also be required to be sent to them which admittedly is not provided for.

S. 240-G reads:

"240-G. Filing of objections—Any person interested or the State Government may in the manner prescribed file before the compensation officer an objection upon such statement within the period of one month from the date of its publication."

(*Italicised by us*).

The word "person interested" means "person interested in receiving the compensation". There is no provision for the filing of objections by persons claiming to be *adhivasis* or *sirdars* of the land acquired.

From this provision also it follows that compensation statement is prepared only for the purpose of paying compensation to the landlord.

S. 240-H deals with the disposal of objections. It reads:

"240-H. Disposal of objections—(1) Except as provided in sub-s. (2), the compensation officer shall after hearing the parties, if necessary, on the objec-

tions filed under s. 240-G dispose of the objections in the manner prescribed.

(2) Where the objection filed under sub-s. (1)—

(a) is that the land is not land referred to in sub-s. (1) of s. 240-A, the compensation officer shall frame an issue to that effect and refer it for disposal to the Court which would have jurisdiction to decide a suit under s. 229-B read with s. 234-A in respect of the land and thereupon all the provisions relating to the hearing and disposal of such suits shall apply *to the reference as if it were suit*;

(b) involves a question of title and such question has not already been determined by a competent Court, except in cases in which s. 240-H applies refer the question for determination to the Court of competent jurisdiction.

Explanation—Whether a person is or is not an *adhivasi* shall not be deemed to raise a question of title within the meaning of this clause.

(3) That District Judge shall determine the question referred to him under cl. (b) of sub-s. (2) in the manner prescribed and his decision thereon shall be final.” (*Italicised by us*).

An analysis of this provision reveals that only two kinds of objections are contemplated i.e. (i) that the land is not one referred to in sub-s. (1) of s. 240-A that is to say, the land is not one occupied by an *adhivasi*; (ii) that not the person whose name is shown in the compensation statement, but the objector is the landlord and for that reason entitled to receive compensation. In our opinion, the expression “involves a question of title” occurring in cl. (b) means, when the question is raised as to who is entitled to receive compensation. The Explanation makes it abundantly clear that whether or

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not a person is an *adhivasi* shall not be deemed to raise a question of title. From this it follows that whether or not a person is an *adhivasi* shall not be determined by the District Judge. In this chapter there is no provision under which the question as to who is the *adhivasi* or the *sirdar* of the land in question is to be determined. As would appear from the scheme of the chapter, as disclosed by its various provisions, the two parties to the proceedings contemplated by this chapter are (i) the State who acquires the plots occupied by *adhivasis*, and (ii) the landlord or the person who owns the plots and is thus entitled to receive compensation. There is no third party contemplated. It is true that cl. (e) of sub-s. (2) provides that if the objection is that the land is not occupied by an *adhivasi*, an issue to that effect be framed and referred by the compensation officer to the Court which has jurisdiction to decide a suit under s. 229-B read with s. 234-A of the U. P. Z. A. & L. R. Act. S. 229-B reads:

"229-B. *Suit by an asami for declaration of rights*—(1) Any person claiming to be an *asami* whether exclusively or jointly with any other person may sue the landholder—

(a) for a declaration that he is an *asami* of the holding, or

(b) for a declaration of his share therein.

(2) In any suit under sub-s. (1) any other person claiming to hold as *asami* under the landholder shall be impleaded as defendant.

(3) The provisions of sub-ss. (1) and (2) shall *mutatis mutandis* apply to a suit by a person claiming to be a *bhumidhar* or *sirdar*, as the case may be, with the amendment that for the word 'landholder' the words 'the State Government and Gaon Samaj' are substituted therein."

S. 234-A reads:

"234-A. Application of ss. 212-B, 212-C and 229-B to 229-D in the case of an *adhivasi*—The provisions of ss. 212-B, 212-C and 229-B to 229-D shall apply to an *adhivasi* as if he were 'an *asami*'."
(*Italicised by us*).

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On our judgment, s. 240-H(2a) only provides for the framing of an issue to the effect as to whether or not the land is one occupied by an *adhivasi* and refer it to the court having jurisdiction to decide a suit filed under s. 229-B read with s. 234-A of the U. P. Z. A. & L. R. Act. The words "where the objection filed under sub-s. (1) is that the land is not land referred to in sub-s. (1) of s. 240-A, the compensation officer shall frame an issue *to that effect*" mean that the issue shall not be as to who is the *adhivasi*, if any, of the land, but whether there is any *adhivasi* occupying the land. This is clear from the use of the words "to that effect". This again, would show that the question as to which particular person is or persons are *adhivasi* or *adhivasis* of the land in suit or are *sirdar* or *sirdars* of it is not to be decided under s. 20-H of the Act. We have already pointed out that there is also no other provision under which it can be decided. The Explanation makes it clear that the question whether a person is or is not an *adhivasi* shall not be deemed to raise a question of title with the result that that question cannot be adjudicated upon under s. 240-H or any other provision. S. 240-I provides for appeal to the Collector and reads:

"240-I. Appeal to the Collector—Notwithstanding anything contained in any law, any person aggrieved by the order of the compensation officer deciding the objection in so far as it relates to the amount of compensation under s. 240-H may appeal to the Collector, who shall decide the appeal in the

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manner prescribed and the decision of the Collector shall be final."

It would be noticed that the appeal under s. 240-I is only in respect of the amount of the compensation and not in respect of the entries relating to *adhivasi* or *sirdari* rights. If the idea was that any incidental entry in the compensation statement describing a person as a *sirdar* or an *adhivasi* also forms an integral part of the compensation statement, appeal would have been provided against that also which admittedly is not provided by s. 240-I of the Act.

S. 240-J reads:

"240-J. *Final publication of the statement*—(1) Where no objection has been filed in regard to the compensation statement published in pursuance of s. 240-F, or where such objections are filed and have been finally disposed of, the statement shall, where necessary, be amended, altered or modified. The compensation officer shall sign the statement and affix his seal thereto.

(2) The statement so signed and sealed shall become final.

(3) *A copy of the final statement shall be supplied free of charge to the landholder concerned.*" (*Italicised by us*).

The compensation statement signed and sealed becomes final only in respect of matters which relate to compensation and not in respect of ancillary matters. The words "where no objection has been filed in regard to the compensation statement" clearly show that where no objection has been filed either with regard to the amount of the compensation or with regard to the right of the person shown as landholder to receive compensation, the compensation statement shall become final. If, however, an objection has been made and allowed in whole or part

then the amended or modified compensation statement shall become final.

S. 240-K(2) provides that compensation shall be paid to the landholder whose name is entered in the final compensation statement and where the landholder dies before it is paid to him, it shall be paid to his legal representatives.

For the reasons mentioned above, we are of the opinion that there is no provision in Chap. IX-A under which an adjudication in respect of *adhivasi* or *sirdar* can be made. Chap. IX-A only deals with the acquisition of the rights of an intermediary or a landlord in respect of his land occupied by *adhivasis* and for payment of compensation to him. It also declares the law that any person, who is an *adhivasi* of such land, shall become *sirdar* thereof, but the machinery for the determination of the question whether a particular person is or is not an *adhivasi* and, therefore, is or is not a *sirdar*, is not contained in Chap. IX-A of the Act, but is contained, as pointed out earlier, in ss. 229-B and 234-A of the Act. We would also like to point out that there is nothing in s. 240-D which requires that in a compensation statement an entry giving the names of the various persons who are *adhivasis* and have consequently become *sirdars* should be made. If some names are, in fact, entered it is only for the ancilliary purpose of showing that it is a land occupied by *adhivasis*.

Mr. Misra placed reliance upon cl. (d) of s. 240-D of the Act which reads:

"Such other particulars as may be prescribed."

He has drawn out attention to r. 193-B of the rules framed under the Act.

R. 193-B of the rules framed under the Act reads:

"As soon as the notification under s. 240-A has been published, the following statements shall be prepared in—

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(i) Z. A. Form 101 in respect of lands held by *adhivasis* other than evacuee land. Part I of the statement shall contain particulars in respect of whole *khatas* no part of which is held by *adhivasis* who hold evacuee land. Part II of the statement shall contain particulars of *khatas* part only of which is so held."

In the first place, this rule does not say that the names of *adhivasis* are to be mentioned and in case of a dispute, the question shall be decided and the name of one who succeeds shall be entered. The rule only provides that Z. A. Form 101 shall be prepared in respect of the land held by *adhivasis*. It is the land which is material and not the name of the *adhivasis*. Compensation is to be paid for the acquisition of the land and consequently, the land occupied by the *adhivasis* has necessarily to be mentioned in the compensation statement, but there is nothing in r. 193-B (i) which indicates that apart from the land the names of the *adhivasis* are also required to be mentioned.

That being the law, we do not see how it can be seriously urged that if a name is entered as *adhivasi* in the compensation statement, the entry becomes sacrosanct and cannot be challenged. If the law does not require the name of the alleged *adhivasi* to be mentioned, if the law does not permit an objection being made by a rival claimant, if the law does not provide a machinery for the adjudication of the disputes between rival claimants each claiming to be an *adhivasi* or a *sirdar*, we do not see how can any finality be attached to the entry in the compensation statement of a particular name shown as *adhivasi* in respect of a plot of land, made with the sole object of showing that the land is one occupied by an *adhivasi*.

That being our view on the construction of s. 240-J of the Act, we hold that the entry of the name of the appellant as *adhivasi* or *sirdar* in the compensation state-

ment was no bar against the consolidation authorities deciding as to whether the appellant or the respondent was the *adhivasi* or *sirdar* of the plots in dispute. S. 330 or s. 331 of the Act also does not bar the investigation of the question as to who is the *adhivasi* or the *sirdar* of the plots in dispute by the revenue courts. S. 330 of the Act reads:

"Save as otherwise provided by or under this Act, no suit or other proceeding shall lie in any civil court in respect of any entry in or omission from a compensation assessment roll or in respect of any order passed under Part I of this Act."

This section would not apply, firstly, because consolidation authorities are not civil courts and, secondly, because the compensation statements prepared under Chap. IX-A of the Act are not compensation assessment rolls.

Compensation assessment rolls are those prepared under Chap. III of the Act. S. 331 of the Act provides that "no court other than a court mentioned in column 4 of Sch. II, shall, notwithstanding anything contained in the Civil Procedure Code, 1908, take cognizance of any suit, application, or proceedings mentioned in column 3 thereof." Inasmuch as there is no provision for any application or suit being made under the provisions of Chap. IX-A of the Act. S. 331 of the Act cannot apply to a compensation statement prepared under Chap. IX-A of the Act and for that reason any person, who claims to be an *adhivasi* or a *sirdar*, can bring a regular suit in spite of an entry of a person as *sirdar* in the compensation statement.

Mr. Misra has placed reliance upon the following observations in *Langra v. Board of Revenue, U. P., Allahabad* (1):

"After the publication of the preliminary statement in which the petitioner was shown as the *sirdar*

(1) 1961 A.L.J. 635.

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and the respondents nos. 6 to 9 as *adhivasis* the petitioner did not file any objection in time. The objection he filed being beyond time was rejected by the compensation officer himself and his order became final. On this basis when the declaration suit filed by the petitioner was being considered in second appeal by the Board of Revenue it was contended that the rights of the petitioner had got extinguished and that he could not, therefore, claim a declaration that he was a *sirdar*."

This observation by the learned judges is in the nature of *obiter dicta*. They were not called upon to decide the specific question raised before us, the same being whether the petitioner-appellant or the respondent is the *sirdar* of the land in dispute. The case being distinguishable, cannot be treated to be a precedent.

Mr. Misra also placed reliance upon a single Judge decision of this Court in *Brij Raj Singh v. Commissioner, Lucknow Division, Lucknow* (1). With great respect to NIGAM, J., who decided *Brij Raj Singh v. Commissioner, Lucknow Division* (1), we are for reasons mentioned in this judgment unable to agree with him. Besides, this decision was considered by a Bench of this Court in *Smt. Basari Wali v. Board of Revenue, U. P., Allahabad* (2). The learned Judges observed:

"The learned counsel, however, contended that a case reported in *B. R. Singh v. Commissioner* (1) was a contrary decision. We have gone through that case carefully and found that the learned Judge who decided this case on the ground that the correctness or validity of the proceedings under Chap. IX-A of the U. P. Z. A. & L. R. Act had not been challenged either before the consolidation officer or in the writ petition. That point was therefore not allowed to be raised. The language of learned Judge is not

(1) 1964 A.L.J. 910.

(2) 1966 A.W.R. 401.

very apt because a notification under s. 240-A does not relate to individual plots. It is the compensation statement made under the Act which refers to plots. This case is, therefore, not a contrary authority on the question arising in these cases before us."

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We find some support for the view that we are taking from *Smt. Basari Wali v. Board of Revenue, U. P., Allahabad* (1).

For the reasons mentioned above we are in agreement with SHARMA, J. that the consolidation authorities acted within jurisdiction in deciding the question whether the petitioner-appellant or the respondent was the *adhivasi* and thereafter the *sirdar* of the land in dispute, with the result that the second submission of the learned counsel also fails.

The special appeal is dismissed. There is no order as to costs.

Appeal dismissed.

(1) 1966 A.W.R. 401.

APPELLATE CIVIL

Before Mr. Justice Jagdish Sahai and Mr. Justice
R. Chandra.*

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... PETITIONER-
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U. P. Industrial Disputes Act, 1947, s. 6(6)—Award by Labour Court or Tribunal—Award became final under s. 6(5)—Correction of error or omission thereafter—Labour Court or Tribunal became functus officio; Order under s. 6(6) passed after the award became final under s. 6(5)—Order eminently just and equitable—Order not liable to be quashed.

The Labour Court or the Industrial Tribunal becomes *functus officio* after the expiry of 30 days from the date of publication of the award under s. 6(3) and as such, after that period, it cannot amend, alter or correct the award under s. 6(6) of the Act. Once an award becomes enforceable under s. 6-A of the Act, it becomes final under s. 6(5) of the Act and cannot be disturbed because finality of the award cannot be taken away by the unilateral act of the Labour Court or the Industrial Tribunal.

In the instant case, though, the order under s. 6(6) was passed after the expiry of 30 days from the date of publication of award under s. 6(3) yet it would not be liable to be quashed because of its being eminently just, and equitable, serving the cause of justice.

Special Appeal no. 76 of 1966 against the order of B. N. NIGAM, J., dated 2nd February, 1966 passed in Writ Petition no. 502 of 1964.

Facts appear in the Judgment.

Bishun Singh and *B. C. Agarwal*, for the Appellant.

Mangi Lal and *Ratan Lal*, for the Respondents 3 to 5.
J. S. Trivedi, for the State.

The following judgment of the Court was delivered by—

*While sitting at Lucknow.

JAGDISH SAHAI, J.:—This special appeal is directed against the judgment of B. N. NIGAM, J., dated 2nd February, 1966, dismissing writ petition no. 502 of 1964 filed by the appellant, the Tulsipur Sugar Company, Limited (hereinafter referred to as the Company). The Central Government appointed a Central Wage Board for the Sugar Industry for working out a wage structure and for determining the categories of employees to be brought within the scope of the proposed wage fixation and also for working out the principles governing the grant of bonus. The Central Wage Board made its recommendations which were accepted by the Government. The U. P. Government published a notification in the *State Gazette* of 27th April, 1961 reproducing the recommendations made by the Central Wage Board. One of the recommendations that the Central Wage Board made was that "the wages and dearness allowance specified" in cl. (6) of the recommendations were to "take effect from 1st November, 1960." After the Central Wage Board had made its recommendations and after the same had been accepted and published in the *Gazette*, a dispute arose between the company and the labour. The dispute was taken up by the Union of the workers of the Company known as the Swatantra Chini Mill Karamchari Union, Tulsipur (hereinafter referred to as the Union). The State Government under s. 4-K of the U. P. Industrial Disputes Act (hereinafter referred to as the Act) referred the following dispute to the Labour Court at Lucknow on 14th of May, 1963:

"Should the employers be required to classify their workmen, named in the Annexure as shown in column 4 against each therein and place them in appropriate pay scale in terms of U. P. Government Order no. 2309(ST)/XXXVI-A—273(ST)-1960, dated 27th April, 1961 as amended and extended to date? If so, with effect from what date and with what other details?"

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The Labour Court gave its award on 6th of November, 1963 holding that three of the persons mentioned in the Annexure were not entitled to any relief, but Sarvsri Kailash Nath Srivastava and Shanker Nath Srivastava were entitled to be fitted as Assistant Accountant in grade II-B and as manufacturing clerk, clerical grade IV respectively. In the award the Company was directed to do so within a period of one month after the award came in force.

The State Government got the award published in the *State Gazette*, dated 7th of December, 1963.

The Company allowed Sarvsri Kailash Nath Srivastava and Shanker Nath Srivastava the posts and grades which have been awarded to them by the Labour Court, but not from the 1st of November, 1960. The Company took up the position that they were entitled to those posts only after the award had been enforced. The Union thereupon made an application before the Labour Court Lucknow to amend the award. The Labour Court purporting to act under s. 6(6) of the Act amended the award and clearly stated that the relief given to Sarvsri Kailash Nath Srivastava and Shanker Nath Srivastava was to take effect from the 1st of November, 1960. In the *State Gazette*, dated 20th of June, 1964 the order of the Labour Court, Lucknow, amending the award was published in extenso. The concluding paragraph of that order reads:

"It is, therefore, directed that the employers shall allow the respective nomenclature and grade to these two workmen with effect from 1st November, 1960. The order be published in the official *gazette* in the manner prescribed under s. 6(6) of the Act."

The Company approached this Court by filing the writ petition aforesaid on 3rd of September, 1964. The prayer in the writ petition is that this Court "may be pleased to issue a writ in the nature of *certiorari* after calling the

records of the case and quashing Annexure 6, or to any other writ, order or direction quashing Annexure 6 appropriate under the circumstances of the case and the costs of the petition be awarded."

The writ petition came up for hearing before NIGAM, J. The following two submissions were made before him on behalf of the Company:

(1) That the Labour Court had no jurisdiction to amend the award because it had not committed any clerical or accidental mistake.

(2) That the Labour Court having already specified a date in its previous award and the award as originally made being prospective in its application could not have been made retrospectively applicable from the 1st of November, 1960.

No other submission was made before him.

The learned single Judge repelled both the submissions made on behalf of the Company and dismissed the writ petition.

Mr. *Bishun Singh*, who has appeared for the appellant before us, has reiterated the two submissions that were made before the learned single Judge. We proceed to consider them *seriatim*.

Admittedly a Labour Court or an Industrial Tribunal is a Tribunal of limited jurisdiction. It is not one of the regular courts which function in this country. The long title of the Act reads:

"to provide for powers to prevent strikes and lockouts, to settle industrial disputes and for other incidental matters."

The preamble of the Act reads:

"Whereas it is necessary to provide for powers to prevent strikes and lockouts and for the settlement of industrial disputes and other incidental matters;"

It is hereby enacted as follows:

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As far back as in the *Western India Automobile Association v. The Industrial Tribunal, Bombay* (1), it was held by the Federal Court that the Industrial Tribunals are not regular courts nor have they to decide disputes according to the normal law of the land.

An analysis of the various provisions of the Act reveals that a Labour Court or an Industrial Tribunal is not entitled to take cognizance of any matter unless it is referred to it specifically under s. 4-K of the Act. In other words it is not a court or Tribunal where institutions can be made without reference by the authorities mentioned in the Act. S. 4-K of the Act reads:

"Reference of disputes to Labour Court or Tribunal—Where the State Government is of opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing refer the dispute or any matter appearing to be connected with, or relevant to, the dispute to a Labour Court if the matter of industrial dispute is one of those contained in the First Schedule or to a Tribunal if the matter of dispute is one contained in the First Schedule or the Second Schedule for adjudication:

Provided that where the dispute relates to any matter specified in the Second Schedule and is not likely to affect more than one hundred workmen, the State Government may, if it so thinks fit, make the reference to a Labour Court."

The only other provision under which a reference can be made to a Labour Court or an Industrial Tribunal is s. 5-D of the Act under which the employers and the workmen by a written agreement can refer a matter to a Labour Court or Tribunal for arbitration. There is no provision in the Act under which a Labour Court or Industrial Tribunal can take cognizance of a dispute *suo motu* without there being a proper reference made either under s. 4-K of the Act or under s. 5-B of the Act. The

(1) A.I.R. 1949 F.C. 111.

only other provisions that may be considered are ss. 6-F and 6-H of the Act, but in the case of former there must be a pending reference already made. The latter provision does not deal with a reference or with the resolving of an industrial dispute, but only with enforcing the recovery of payments already due to a workman.

From what we have said above it clearly follows that a Labour Court or Industrial Tribunal seizes jurisdiction only when a reference is made to it and not otherwise. It has no powers to act *suo motu*. S. 6-D of the Act reads:

“Commencement and conclusion proceeding:

Proceedings before a Labour Court or Tribunal shall be deemed to have commenced on the date of reference of a dispute to adjudication, and such proceedings shall be deemed to have concluded on the date on which the award becomes enforceable under s. 6-A.”

This section clearly provides that the jurisdiction of the Labour Court or the Industrial Tribunal would commence on the date when the reference is made to it and shall cease on the date when the award becomes enforceable after being published in the State Gazette, that is to say one month after its publication. The Labour Court purported to act under sub-s. (6) of s. 6, which reads:

“A Labour Court, Tribunal or Arbitrator may, either of its own motion or on the application of any party to the dispute, correct any clerical or arithmetical mistakes in the award, or errors arising therein from any accidental slip or omission. Whenever any correction is made as aforesaid, a copy of the order shall be sent to the State Government and the provision of this Act, relating to the publication of an award shall *mutatis mutandis* apply thereto.”

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This provision admittedly confers on the Labour Court or the Tribunal or the Arbitrator, as the case may be, the jurisdiction to correct any clerical or arithmetical mistakes in the award or errors arising therein from any accidental slip or omission. The question for consideration, however, is whether such a power can be exercised even after the award has been published in the State Gazette and has become enforceable on the expiry of one month from the date of publication. Mr. Bishun Singh, the learned counsel for the appellant, contends that the Labour Court or Tribunal or Arbitrator becomes *functus officio* after the award has become enforceable and it cannot recreate or reconstitute itself for correcting an error.

Having given the matter our anxious consideration we see no escape from the conclusion that a Labour Court or Industrial Tribunal becomes *functus officio* with regard to a particular dispute after its award becomes enforceable under s. 6-A of the Act, that is, after one month from the date of the publication of the award in the Government Gazette. S. 6(6) of the Act, no doubt, confers on a Labour Court or Tribunal or Arbitrator the power to correct arithmetical mistakes or accidental errors or omissions, but it does not provide the period during which such a correction can be made. It does not even say, like s. 152, C. P. C., that correction can be made at any time. Mr. Bishun Singh points out that s. 6(6) of the Act uses the words "whenever any correction is made as aforesaid", but in our opinion the word "whenever" does not mean at any time. It only means that when the correction is made, a copy of it shall be sent to the State Government for publication. The word "whenever", therefore, has no relation to any period of limitation. That being the position, we have to find out if there is any period of limitation provided or a Labour Court or Industrial Tribunal or Arbitrator as the case may be

is free to correct any error or mistake at any time and the period of limitation is indefinite.

An analysis and study of various provisions of the Act reveals to us that the power cannot be exercised indefinitely. Our reasons are as follows:

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(a) S. 6-D of the Act categorically declares that the Labour Court or the Industrial Tribunal would be deemed to have concluded its proceedings on the date on which the award becomes enforceable, that is, after one month of the publication of the award. This, in other words, means that with regard to that particular dispute the Labour Court or the Industrial Tribunal ceases to have jurisdiction or becomes *functus officio* after one month of the publication of the award. When an application is made for correcting an award or amending it, it is not the continuation of the old proceedings, but a completely new proceeding. In *Messrs. Ganpat Rai Hiralal v. The Aggarwal Chamber of Commerce Ltd.* (1) while dealing with an amendment application under s. 152, C. P. C., their Lordships observed:

"There is no warrant for the view that the amendment petition is a continuation of the suit or proceedings therein. It is in the nature of an independent proceeding, though connected with the order of which amendment is sought. Such a proceeding is governed by the law prevailing on its date,"

We see no reason why we should hold that the proceeding started on an application made under s. 6(6) of the Act is the continuation of the old proceedings. Those proceedings must also be treated to be completely new proceedings. The Labour Court or Industrial Tribunal not being competent to take cognizance of a matter or industrial dispute itself, but only

(1) A.I.R. 1952 S.C. 409.

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on a reference it cannot, in our opinion, start fresh and new proceedings for amending the award once the award has become final.

(b) S. 6(6) of the Act does not provide that the correction can be made at any time. It is true that whenever a correction is made, the order shall be sent to the State Government who shall publish it in the State Gazette. This is clear from the words "whenever any correction is made as aforesaid, a copy of the order shall be sent to the State Government and the provision of this Act, relating to the publication of an award shall *mutatis mutandis* apply thereto." If the award has been corrected before it is published under sub-s. (3) of s. 6 of the Act, there would be no occasion for the correction being republished because the award would be published in the amended form. Therefore the circumstance that the legislature thought it fit to provide that the provisions relating to the publication of an award shall *mutatis mutandis* apply even to an order making a correction clearly shows that the correction can be made even subsequent to the publication of the award. But the question is what is the outer limit in which the correction can be made in our judgment the correction can be made within the period commencing from the date of the award to the date when it becomes enforceable. Sub-s. (3) of s. 6 of the Act reads:

"Subject to the provision of sub-s. (4) every arbitration award and the award of a Labour Court or Tribunal shall, within a period of thirty days from the date of its receipt by the State Government, be published in such manner as the State Government thinks fit."

S. 6-A of the Act reads:

"An award (. . .) shall become enforceable on the expiry of thirty days from the date of its publication under s. 6."

Sub-s. (5) of s. 6 of the Act reads:

"Subject to the provisions of s. 6-A, an award published under sub-s. (3) shall be final and shall not be called in question in any court in any manner whatsoever."

From these provisions it follows that the award must be published within one month of its receipt by the State Government from the Labour Court or Industrial Tribunal and that it becomes enforceable after the expiry of thirty days from the date of its publication. Once it is published, it becomes final. It, therefore, appears to us that even though the correction or amendment can be made subsequent to the signing of the award by the Labour Court or Industrial Tribunal or its remission to the State Government or its publication in the *State Gazette*, no amendment or alteration can be made after the expiry of thirty days from the date of its publication in the *State Gazette*. It is only during the period commencing with the signing of the award and its being enforceable under s. 6-A of the Act that a correction or amendment can be made as provided by s. 6(6) of the Act. We draw support for our conclusion from the circumstance that once an award becomes enforceable under s. 6-A of the Act, it becomes final under s. 6(5) of the Act and cannot be called in question in any court. It would also be noticed that whereas sub-s. (5) of s. 6 of the Act provides that the finality shall be subject to the provisions of s. 6-A of the Act, it does not provide that it shall be subject to the provisions of s. 6(6) of the Act.

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(c) By means of an award an industrial dispute is resolved. The award gives the manner in which that dispute is to be resolved. The word "award" has been defined by S. 2(c) of the Act which reads:

" 'Award' means an interim or final determination of any industrial dispute or of any question relating thereto by any Labour Court or Tribunal and includes an arbitration award made under s. 5-B."

It is, therefore, clear that the function of an award is to issue directions resolving a dispute. An award once enforced and implemented becomes incapable of enforcement in the sense that nothing is left to be enforced. If the idea was that an award could be amended indefinitely at any time, however, remote it may be from the date of its enforcement, the result would be that the Labour Court or the Industrial Tribunal would have a power to unenforce an award which had already been implemented. If that interpretation were to be given the result would be that disputes already resolved would be recreated afresh and matters finally concluded will be reopened afresh. That obviously could not be the intention of the legislature. To illustrate what we are saying, let us take a case where the award is that Rs.5,000 be paid to a workman. Can there be an amendment in the award so as to set aside the liability for payment even after it has been made? The answer clearly is that the award having been implemented in the cause in which a decree is satisfied, it loses its capacity of being enforced with the result that there can be no amendment to it, in the same way as no amendment can be made in a decree which has already been satisfied.

(d) A Labour Court or an Industrial Tribunal cannot recreate or reconstitute itself to make an amend

ment. It draws its jurisdiction only by a reference made to it and it ceases to have jurisdiction once the award is enforced. Consequently *vis-a-vis* that dispute, it does not exist at all. It is true that, in the case of *Hari Vishnu Kamath v. Ahmad Ishaque* (1), the fact that the Tribunal had ceased to exist was not treated as a bar to the issue of a writ of *certiorari* to quash its order, but in the present case the question before us is not whether a writ of *certiorari* can be issued to quash the order of the Labour Court, but whether the Labour Court, after becoming *functus officio*, could recreate itself or could seize itself of a new matter in proceeding in which it had become *functus officio*. In our opinion, the case of *Hari Vishnu Kamath* (1) is clearly distinguishable.

Inasmuch as we are taking the view that after the expiry of one month from the date of the publication of the award the Labour Court became *functus officio*, we hold that it could not correct or amend the award nor any order passed by it correcting or amending the award is enforceable by itself. It becomes enforceable only after the award has been published. The award becomes enforceable not by virtue of the order of the Labour Court or the Tribunal, but because of its publication in the *State Gazette*. Once the publication is made and the award becomes final, it cannot be disturbed because the finality of the award cannot be taken away by the unilateral act of the Labour Court or Industrial Tribunal. We are, therefore, of the opinion that the Labour Court had no jurisdiction to make the amendment at the time when it purported to do so.

We are in agreement with the learned single Judge that it is a case of accidental omission or error. One of the questions referred to the Labour Court was as to from which date the employers were required to classify

(1) A.I.R. 1955 S.C. 233.

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the workmen concerned. The Labour Court had to give some answer to this question. They did not specify the date clearly. Once the right of the workmen was upheld, the date could be no other than 1st of November 1960. The Labour Court, no doubt, in its award dated 6th November, 1963, said that "the employers are directed to do this within one month after this award has come in force." Mr. *Bishun Singh* reads this as to mean that the Company was required to classify their workmen after the expiry of one month from the date when the award became enforceable. In our judgment that is clearly misreading the award.

Having perused the award we are of the opinion that the Labour Court did not clearly answer the question as to from what date the Company was to classify their workmen even though it held that they were required to classify them. The words reproduced above and relied upon by Mr. *Bishun Singh* only mean that the Company was directed to comply with the directions made in the award at the latest within one month from the date when the award became enforceable under s. 6-A of the Act and not that the workmen were not entitled to be classified with effect from 1st November, 1960. The award could be implemented on becoming enforceable but from a back date 1st November, 1960. But even though we are holding that the Labour Court had before it a case of clerical or accidental mistake, and for that reason could amend the original award, we are satisfied for the reasons already stated that in the present case it could not do so.

The second submission of Mr. *Bishun Singh* is in a way connected with the first submission. He has submitted that the award was to have prospective application and for that reason the workmen were to be classified after the award had been enforced and not from the 1st of November, 1960. We see no merits in this submission.

We have carefully perused the award and have already pointed out earlier that there is nothing in it to indicate that the classification was to be made with effect from the date the award became enforceable and not with effect from 1st November, 1960. It is true that language used by the Labour Court is not very happy and it has not been very categorically stated that the workmen would be classified with effect from 1st November, 1960. But it is equally true that the Labour Court has not used words to indicate that it wanted the classification of workmen to be with effect from the date the award became enforceable. No doubt the award is silent on the question as to with effect from what date the workmen should be classified.

Even though we have upheld the submission of Mr. *Bishun Singh* that the corrections were made beyond the period during which the Labour Court was competent to do so, we are satisfied that it is not a fit case in which a writ should be issued. The main submission of Mr. *Bishun Singh* was that a correction of an accidental or clerical mistake or omission could be made not under s. 6(6) of the Act, but under s. 11-B of the Act. He has never disputed the power of the Labour Court to make the amendment on the ground of accidental or clerical mistake or omission. In other words the submission of Mr. *Bishun Singh* is hyper-technical. Whether the order making correction or amendments in the award could be made under s. 11-B or under s. 6(6) of the Act is wholly immaterial, once it is conceded that a clerical or arithmetical mistake or accidental slip or omission could be corrected. Admittedly the award dated 6th November, 1963 was not challenged in this Court and became final between the parties after it was published. If the award is to be enforced, there must be a date with effect from which the classification is to be made. On this point the award is silent. The interest of justice

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required that the date with effect from which the classification was to be made should be clearly given in the award and this is precisely what the Labour Court did not do. Mr. *Bishun Singh* contends that s. 6-A(4) of the Act provides that "..... the award shall come into operation with effect from such date as may be specified therein, but where no date is specified, it shall come into operation on the date when the award becomes enforceable under sub-s. (1) or sub-s. (2) as the case may be." Enforceability of an award is quite a different matter from the direction contained in it as to with effect from what date the classification will take place. Sub-s. (4) of s. 6-A of the Act, therefore, does not meet the question that has been raised before us the same being that the award dated 6th November, 1963, was silent as to with effect from what date will the classification take place and to that extent the second question involved in the reference inadvertently remained unanswered by the Labour Court. Admittedly the award dated 6th November, 1963, became final, the petitioner-appellant having never challenged it. And yet it could not be fully enforced in the absence of the direction as to with effect from what date the classification was to take place. Interest of justice required that such a date should be given and as already pointed out earlier this is precisely what the Labour Court had not done. Under these circumstances it appears to us that the order passed by the Labour Court dated 9th May, 1964, is imminently just and must be upheld by this Court. It is well settled that the writ jurisdiction is equitable and no party, who has no equity and justice on its side, is entitled to get a writ issued. We have already said earlier that the order dated 9th May, 1964, serves the cause of justice and for that reason should be upheld. We may also add that the matter is far too petty. There are only two workmen involved and the amount involved is also not much. We are told it is below Rs.4,000. It is of utmost importance

that the employers should treat their labour properly. Social justice is the key note of our Constitution and the basic principle on which a welfare State works. Under these circumstances we are of the opinion that the Company would have been better advised not to invoke the jurisdiction of this Court under Article 226 of the Constitution of India or at any rate not to have filed this special appeal. Once they have accepted the award dated 6th November, 1963, they should have implemented it rather than try to circumvent it by challenging an ancillary and necessary order. We are, therefore, of the opinion that even though technicalities are on the side of the appellant, justice and equity are against him, and B. N. NIGAM, J. was right in dismissing the writ petition.

We dismiss this special appeal, but direct the parties to bear their own costs.

Appeal dismissed.

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SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Wanchoo, the Hon'ble Mr. Justice Shelat and the Hon'ble Mr. Justice Mitter

1966
October, 5.

SHYAM SUNDER

... APPELLANT

v.

SATYA KETU AND OTHERS

... RESPONDENTS

(ON APPEAL FROM THE HIGH COURT AT
ALLAHABAD)

Representation of the People Act (43 of) 1951, s. 116-A—Conduct of Election Rules, 1961, r. 73(2)—Appeal against the order of the Tribunal in the election petition—Filing of decree, Whether necessary—Marking of ballot paper by figure 1 in Roman form—whether valid.

Representation of the People Act does not require the preparation of a decree after the conclusion of the trial of an election petition and accordingly no copy of the decree need be filed with the memorandum of appeal to the High Court.

R. 73(2) of the Conduct of Election Rules does not warrant and cannot justify the declaration of a ballot paper as invalid if it is marked by the figure 1 in one form or the other including Roman form. If any word like "st" or "one" in bracket is put down after the figure 1, the words can be ignored. The construction is borne out by the explanation added subsequently to the rule under consideration for the purpose of removing the doubt or difficulty in question.

Civil Appeal No. 204 of 1966 from the judgment and decree, dated the 10th March, 1965, of the Allahabad High Court in F. A. No. 213 of 1964.

G. N. Dikshit, for the Appellant.

R. K. Garg and S. C. Agarwal, for the Respondent No. 1.

The following Judgment of the Court was delivered by—

WANCHOO, J.:—This is an appeal on a certificate granted by the Allahabad High Court and arises in the following circumstances. An election was held for one seat to the U. P. Legislative Council from the Rohilkhand Graduates Constituency on 22nd April, 1962. There were 14 candidates, and election was held in accordance with the system of proportional representation by means of single transferable vote. Total number of votes cast were 4412 and 2207 first preference votes were required to secure the return of any candidate at the first count. As no candidate secured the minimum votes at the first count, subsequent counts had to be made excluding the candidate who had received that lowest number of votes on each count. Eventually, Satya Ketu respondent got the highest number of votes after the last count and he was declared elected by a margin of 47 votes. Thereupon the appellant filed an election petition claiming that a declaration be made that the election of Satya Ketu was void and that the appellant was duly elected from this constituency. The basis of the appellant's claim was that invalid votes had been counted in favour of Satya Ketu inasmuch as ballot papers on which figure 1 was not marked were counted as valid when they should have been counted as invalid in view of r. 73(2) of the Conduct of Elections Rules, 1961 (hereinafter referred to as the Rules). Satya Ketu contended in reply that all the votes counted in his favour were valid votes and therefore, prayed that the petition should be dismissed.

Thus the main question for decision before the Election Tribunal (hereinafter referred to as the Tribunal) was whether votes which should have been declared in-

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valid in view of the provision of r. 73(2) of the Rules had been counted as valid in favour of Satya Ketu. The Tribunal scrutinised the ballot papers and divided them into a number of categories. It held that certain ballot papers bore the Roman numeral I instead of the Arabic numeral 1. It therefore held that ballot papers marked with the Roman numeral I were invalid under r. 73(2) of the Rules as they did not bear the Arabic figure 1. It thus came to the conclusion that 491 votes cast in favour of Satya Ketu were invalid. It therefore allowed the petition and declared the election of Satya Ketu respondent void and further declared the appellant to be duly elected from that constituency.

Satya Ketu then went in appeal to the High Court, and his contention was that the Tribunal was wrong in holding that ballot papers which had been marked by Roman numeral I were invalid. He therefore contended that 491 votes rejected by the Tribunal were validly cast and the petition should have been dismissed. The appellant on the other hand contended that the Tribunal's view was correct. In addition, the appellant raised a preliminary objection, namely, that the appeal should be dismissed as it was not accompanied by a copy of the decree. The High Court over-ruled the preliminary objection and held that no copy of decree was necessary in view of the provisions of s. 98 and s. 116-A of the Representation of the People Act, No. 43 of 1951, (hereinafter referred to as the Act). On the merits it held that r. 73(2) did not mean that preference expressed by writing down the Roman numeral I in place of the Arabic numeral 1 would make the ballot paper on which the Roman numeral I was written invalid. It therefore, counted as valid votes which bore the Roman numeral I. Thus out of 491 votes which were declared invalid by the Tribunal, the High Court was of the view that 460 votes were valid and as Satya Ketu had won by 47

votes and would still win by 16 votes, it allowed the appeal and dismissed the petition. The present appeal has been filed by the appellant with a certificate granted by the High Court.

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The first contention on behalf of the appellant is that the appeal before the High Court was not maintainable as a copy of the decree was not filed along with the judgment of the Tribunal. It appears that a direction was given by the Tribunal to the effect that a decree containing the details of cost should be prepared, though no such decree was actually prepared at any time. The question that falls for decision therefore, is whether a decree is required to be prepared in accordance with the judgment of the tribunal in an election petition, and if so, whether it is necessary to file a copy of such decree along with a copy of the judgment of the Tribunal when filing an appeal under s. 116-A of the Act.

It is necessary for this purpose to examine briefly the scheme of the Act with respect to election petitions contained in Part VI thereof. That Part begins with s. 79 which defines certain words in the context of Parts VI, VII and VIII. S. 80 provides that no election shall be called in question except by an election petition presented in accordance with the provisions of Part VI. S. 81 provides for presentation of petitions before the Election Commission, s. 82 for parties to the petition and s. 83 for contents of the petition. S. 84 provides for relief to be claimed by the petitioner, s. 85 for procedure by the Election Commission on receipt of an election petition and s. 86 for appointment of election tribunals and reference of election petitions to the tribunal. S. 88 provides for the place of trial, and then comes s. 90 which provides for the procedure for trial. Sub-s. (1) thereof lays down that—

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"Subject to the provisions of this Act and of any rules made thereunder every election petition shall be tried by the tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits."

Ss. 91 to 97 provide for certain other matters to which reference is unnecessary. S. 98 provides for the decision of the tribunal, and lays down that—

"At the conclusion of the trial of an election petition the tribunal shall make an order—

- (a) dismissing the election petition; or
- (b) declaring the election of all or any of the returned candidates to be void; or
- (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected;"

It is unnecessary to refer to ss. 99 to 116 which provide for certain matters. Then comes s. 116-A which provides for appeals against orders of election tribunals. Sub-s. (1) thereof lays down—

"An appeal shall lie from every order made by a tribunal under s. 98 or s. 99 to the High Court of the State in which the tribunal is situated."

Sub-s. (2) thereof provides that—

"The High Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority, and follow the same procedure, with respect to an appeal under this Chapter as if the appeal were an appeal from an original decree passed by a civil court situated within the local limits of its civil appellate jurisdiction."

S. 120 provides for costs and lays down that costs including pleaders' fees shall be in the discretion of the tribunal. S. 122 provides for execution of orders as to costs and lays down that "any order as to costs under the provisions of this Part may be produced before the principal civil court of original jurisdiction within the local limits of whose jurisdiction any person directed by such order to pay any sum of money has a place of residence or business, or where such place is within a presidency town, before the court of small causes having jurisdiction there, and such court shall execute the order or cause the same to be executed in the same manner and by the same procedure as if it were a decree for the payment of money made by itself in a suit."

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It will be seen from this brief review of the provisions of Part VI of the Act that there is no provision therein for passing a decree by the election tribunal. S. 98 which refers to the decision of the tribunal says in specific terms that the tribunal shall make an order at the conclusion of the trial and indicates the three types of orders that the tribunal is entitled to make. If the Act intended that tribunals shall pass a decree, there was nothing to prevent the Legislature from saying so in terms in s. 98. Further s. 120 lays down that costs will be in the discretion of the tribunal, and s. 122 shows that any order as to costs shall be executed as if it were a money decree. Now if the Act intended that there should be a decree following the judgment of an election tribunal it would not have been necessary to say in s. 122 that an order passed by the tribunal with respect to costs shall be executed as if it were a money decree of a civil court. It may be that the Tribunal in this case passed an order to the effect that a decree for costs be prepared; but the use of the word "decree" by the Tribunal was in our opinion an error and what may be prepared on the basis

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of an order for costs passed by a tribunal would be a memorandum of costs which can be executed, if necessary, under s. 122 of the Act. Therefore, when the Tribunal ordered that a decree containing the details of costs should be prepared all that it means is that a memorandum of costs should be prepared in case any party wanted it for purposes of execution under s. 122 of the Act. Further it is not disputed that there is no provision in any rule framed under the Act for the preparation of a decree by the election tribunal. What is urged is that under s. 90(1), an election petition has to be tried as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits and that, it is urged, necessarily means that a decree should be prepared by the tribunal in the same manner as a decree is prepared by a civil court at the end of the trial of a suit. We are of opinion that this conclusion does not follow from the language of s. 90. In the first place, s. 90 begins with the words "subject to the provisions of this Act and of any rules made thereunder", and in the next place, it enjoins that the procedure for the trial of suits should be followed *as nearly as may be*. Therefore, the scheme of Part VI with respect to election petitions and their trial shows that it is not necessary to draw up a decree at all, and that is undoubtedly so as we have already indicated above. The fact that the trial has to be in accordance with the procedure laid down for the trial of suits would not bring in those provisions of the Code of Civil Procedure, which require the preparation of a decree at the conclusion of trial of a suit, for s. 90(1) itself indicates that the procedure should be as nearly as may be of the Code of Civil Procedure. We are therefore of opinion that in view of the provisions of the Act it is unnecessary to prepare a decree after the conclusion of the trial of an election petition; s. 90(1) would not make those pro-

vision of the Code of Civil Procedure which require the preparation of a decree applicable to the trial of an election petition, for the Code of Civil Procedure has to be applied to such trial as nearly as may be and subject to the provisions of the Act. Further we have no doubt that preparation of a decree is not necessary after the conclusion of the trial of an election petition.

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Let us then turn to s. 116-A of the Act to see if there is anything in that section which requires the filing of a decree along with copy of the judgment of the tribunal. S. 116-A *inter alia* provides for appeals against orders made by a tribunal, under s. 98. We have already referred to the fact that s. 98 does not speak of a decree. S. 116-A provides for an appeal not from a decree of the tribunal but from an order passed by it *inter alia* under s. 98. It is true that sub-s. (2) of s. 116-A lays down that the High Court shall follow the same procedure with respect to such an appeal as if the appeal were an appeal from an original decree passed by a civil court. But that in our opinion does not mean that a copy of decree is necessary before an appeal under s. 116-A is maintainable, for the simple reason that the scheme of the Act shows that no decree is necessary to be prepared by the tribunal at all and the appeal under s. 116-A (1) is also from an order and not from a decree. In this connection we may refer to s. 96 of the Code of Civil Procedure which provides for an appeal from an original decree. That section *inter alia* provides that an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeals from the decisions of such court. It will be seen that s. 96 of the Code of Civil Procedure provides for appeal from a decree in a suit, and that is why it is necessary to prepare a decree, the same is also provided in s. 33 of the Code of Civil Procedure which in terms lays down that "the court, after the case has been heard,

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shall pronounce judgment, and on such judgment a decree shall follow". We have no corresponding words in ss. 98 and 116-A of the Act, and that shows that it is not necessary to prepare a decree at the conclusion of the trial of an election petition and in consequence no copy of decree is necessary to be filed when an appeal is filed under s. 116-A of the Act.

In this connection our attention is drawn to the Rules of the Court, 1952, framed by the Allahabad High Court under Art. 225 of the Constitution, relating to appeals. R. 8 of Chap. IX *inter alia* lays down that the memorandum of appeal shall be accompanied by a copy of the decree against which the appeal is directed and a copy of the judgment upon which such decree is founded. This rule is in accordance with what the Code of Civil Procedure requires. But Chapter XIV-A of the Rules of the Court was framed by the Allahabad High Court specifically with respect to appeals from orders of election tribunals, and r. 2 thereof lays down that every memorandum of appeal shall be accompanied by a certified copy of the order against which the appeal is directed. This is in accordance with the scheme of the Act, for the Act contemplates an appeal against an order of the election tribunal under s. 116-A of the Act. Further r. 14 of Chap. XIV-A makes it clear that other rules relating to first appeals contained in Chapters IX, X, XI XII and XIII will apply subject to the provisions of Chap. XIV-A. Therefore so far as the Rules of Court are concerned, they do not provide for filing of a copy of the decree and rightly so, for no decree is required to be prepared at the conclusion of the trial of an election petition by the tribunal.

Reference is also made to O. XLI r. 1 of the Code of Civil Procedure, which provides that a memorandum of appeal shall be accompanied by a copy of the decree appealed from and, unless the appellate court dispenses

therewith, of the judgment on which it is founded. That rule however cannot apply in full in the case of an appeal from an order of the election tribunal in an election petition, for, if the Act does not contemplate the framing of a decree and does not provide for an appeal from a decree, that part of O. XLI, r. 1 which requires the filing of a copy of the decree appealed from, cannot in the very nature of things apply to an appeal under s. 116-A of the Act. We are therefore of opinion that in an appeal under s. 116-A, all that is necessary to be filed is a copy of the judgment of the tribunal, and no more. The preliminary objection therefore fails.

Coming now to the merits of the appeal, the whole argument of the appellant is based on r. 73 (2) of the Rules, which is in these terms:

“(2) A ballot paper shall be invalid on which—

- (a) the figure 1 is not marked; or
- (b) the figure 1 is set opposite the name of more than one candidate or is so placed as to render it doubtful to which candidate it is intended to apply; or
- (c) the figure 1 and some other figures are set opposite the name of the same candidate; or
- (d) there is any mark or writing by which the elector can be identified.”

What is contended is that r. 73 (2) (a) requires that figure 1 must be marked on the ballot paper, and if that is not marked, the ballot paper would be invalid. That is undoubtedly so. But the rule does not say that figure 1 which has to be marked must be marked in what are called Arabic numerals or the International form of Indian numerals. If that was the intention we should have found it specifically mentioned in the rule. It is true that in r. 73(2) (a), the figure 1 is shown in the form of Arabic numeral, but that does not mean that the rule

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intended that figure 1 on the ballot paper can only be marked in the Arabic form and in no other. It would in our opinion not be right to read cl. (a) as laying down that figure 1 has to be marked in Arabic notation and if that is not so, the ballot paper would be invalid. It seems to us that what the rule provides is that the ballot paper has to be marked with figure 1 to show first preference. Therefore, if there is figure 1, first preference would be shown irrespective of whether the figure was put down in the form of Arabic numerals or in any other form. So long as it is clear that figure 1 is marked on the ballot paper, the ballot paper would be valid and it is only when figure 1 is not marked at all in any form whatsoever that it can be said that the ballot paper is invalid. We may mention that the view we are taking has now been made clear beyond doubt by the addition of an *Explanation* to s. 73 (2), which reads thus:

"The figures referred to in cls. (a), (b) and (c) of this sub-rule may be marked in the international form of Indian numerals or in Roman form or in the form used in any Indian language, but shall not be indicated in words."

We are of opinion that this must have been the intention of the rule as it stood before the *Explanation* was added, for the marking of figure 1 on the ballot paper was necessary to indicate the first preference without which the ballot paper would be invalid. If first preference is indicated by marking the figure 1 in one form or other, that would in our opinion be in full compliance with r. 73 (2) (a), and the ballot paper would not be invalid. It is only if figure 1 is not marked at all in any form that the ballot paper would be invalid under r. 73 (2) (a). We agree with the High Court that marking of figure 1 in Roman form is in full compliance with r. 73 (2) (a). To say that Roman figures are composed of letters of the alphabet is in our opinion no answer to the argument,

for it is well known how figures are marked in Roman form, and there is no dispute as to the Roman form of the figure 1. We are, therefore, of opinion, where figure 1 is marked on the ballot paper, whether it be in one form or other including the Roman form, that is in full compliance with the rule, and the ballot paper would not be invalid in the circumstances.

Then it is urged that besides the Roman figure I, some other words were added in some cases. Even if that were so, we are of opinion that r. 73 (2) (a) would not justify declaration of a ballot paper as invalid so long as the figure 1 is marked. If any other word is put down, like "st", after the Roman figure I or the word "one" in brackets thereafter, that would not invalidate the vote for the figure "1" would be there to show the first preference, and those words can be ignored. We are therefore, of opinion that the view taken by the High Court is correct.

The appeal fails and is hereby dismissed with costs.

Appeal dismissed.

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CRIMINAL REVISION

Before Mr. Justice Uniyal

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October, 19.

RAM SAMUJH AND OTHERS

... APPLICANTS

v.

STATE

... OPPOSITE-PARTY

Indian Penal Code, 1860, ss. 188 and 454—Applicability—Disobedience of order under s. 145, Cr. P. C.—S. 188, I. P. C. applies—‘Promulgation’ of an order—Order under s. 145 Cr. P. C. prohibiting a party to interfere—Amounts to promulgation—S. 188, I. P. C. includes both judicial and executive orders.

S. 188, I. P. C. includes in its ambit both executive as well as judicial orders. A judgment or an order passed in open court constitutes a formal declaration to the public of the decision in the case. Therefore, the final order passed in s. 145, Cr. P. C. is a promulgation at least to the parties, and consequently s. 188 I. P. C. would apply.

Jagpal Singh v. State (1) followed.

Dalganjan Koeri v. State (2) elucidated.

Criminal Revision No. 542 of 1965 against the judgment and order of P. K. Banerji, Sessions Judge, Jaunpur, dated 28th November, 1964.

T. Rathore, for the Applicant.

Government Advocate for the Opposite Party.

UNIYAL, J.:—The applicants have been convicted under ss. 454 and 188, I. P. C. and have been sentenced to various terms of imprisonment.

It appears that there was dispute between one Jagdeni and the accused persons over the possession of a house. It resulted in proceedings under s. 145 in the court of Sub-Divisional Magistrate of Shahganj. On 14th March, 1964, the Magistrate passed a preli-

(1) 1959 A.L.J. 163.

(2) A.I.R. 1956 All. 630.

minary order and directed the attachment of the property, which was given in the possession of Ramraj Supurdar. The police locked the house and handed over the key to the Supurdar. On 19th July, 1964, the accused approached the Supurdar and demanded the key from him. On his refusal to hand over the key the accused broke open the lock and took forcible possession of the house. On the following day the Supurdar moved an application in the court of Sub-Divisional Magistrate complaining of the forcible occupation of the house by the applicants. Thereupon the Magistrate filed a complaint against the accused under s. 188, I.P.C. Both the courts below had recorded a finding that the accused took forcible possession of the house by breaking open the locks and that they disobeyed the order of the Magistrate promulgated by him on 14th March, 1964. They further held that the accused were guilty of house-breaking in order to commit the offence of theft.

The sole point urged by the learned counsel was that no order under s. 188, I.P.C. was promulgated by the Magistrate and, therefore, the applicants were not liable to be convicted. It was contended that what is made punishable under s. 188 is an order made by a public functionary in the public interest and that an order requiring a private party not to interfere with the possession of another would not amount to 'promulgation' of an order.

Reference was made to a Division Bench case of *Dalganjan Koeri v. State* (1) in which it was stated that:

"The disobedience of an order promulgated by a public servant, which has been made punishable by s. 188, I. P. C. must be a disobedience which causes or tends to cause obstruction, annoyance or

(1) A.I.R. 1956 All. 630.

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injury or risk of obstruction, annoyance or injury to any person lawfully employed. This also suggests that orders contemplated under s. 188, I.P.C. are orders made by public functionaries in the public interest. The disobedience of any order passed in favour of a party to the litigation by a court may result in annoyance to the party in whose favour it has been passed, but it cannot be said that it necessarily causes or tends to cause obstruction or annoyance or injury to any person."

It was further observed:

"Section 188, I. P. C. does not contemplate orders passed by civil or revenue courts in judicial proceedings."

From this it was sought to be argued that inasmuch as the preliminary order was passed by a criminal court the disobedience of such an order would not amount to an offence under s. 188, I.P.C.

It seems to me that the learned counsel has not read the judgment carefully and has not been able to appreciate the principle laid down by the court in that case. In the abovenoted case the learned Judges were careful to point out at page 631 that—

"the matter was finally decided on the facts of that case *State v. Smt. Tugla* (1) and the opinion of the majority of the Judges was that an order under s. 145, Cr. P. C. was an order the breach of which was punishable under s. 188, I.P.C. as to the parties to that order but this decision did not deal with the question of orders passed in judicial proceedings by civil, revenue or criminal courts."

(1) A.I.R. 1955 AH. 423.

What was meant by the learned Judges was that judicial proceedings relating to prosecution of an accused before a criminal court are not governed by s. 188, I.P.C. The above decision, therefore, far from supporting the learned counsel goes against him.

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The question as to whether s. 188, I.P.C. applied to the disobedience of an order made under s. 145, Cr. P. C. was directly raised in *Jagpal Singh v. State* (1) and the matter was fully and thoroughly discussed by A. N. MULLA, J. After reviewing the case-law on the point, he stated the legal position thus:

"It is obvious that the final order passed in s. 145 proceedings under sub-s. (6) is a promulgation at least as far as the parties to that proceeding are concerned. The word 'promulgation' in essence means that the contents of the order which is promulgated should be known to the person against whom proceedings are taken under s. 188, I.P.C. S. 188, I. P. C. includes in its ambit both executive order and judicial orders. The executive authorities cannot make their orders known to be public at large without adopting some form of promulgation. They do not pass any orders in a case in which they pronounce a judgment. It was perhaps for this reason that the word 'promulgated' was used in s. 188, I. P. C. On the other hand the pronouncement of a judgment in open court is a promulgation to the parties to that case. As s. 188, I. P. C. is enacted to ensure public tranquillity, health, safety and convenience, it is obvious that the order of the public servant whether on the executive or on the judicial side which is made for this purpose is governed by s. 188, I.P.C. A judgment or an order passed in open court constitutes a formal declaration to the public of the decision of the court in the case in which

(1) 1959 A.L.J. 169.

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the order is given or the judgment is passed. I am, therefore, of the opinion that s. 188, I.P.C. includes in its ambit the orders passed under s. 144, Cr. P.C. as well s. 145, Cr. P. C."

In the present case the Magistrate had passed the impugned order in the presence of parties and it was known to both of them. Ram Raj Supurdar stated on oath that when possession was handed over to him by the police it was proclaimed by the beat of drum that the house had been attached and possession delivered to the Supurdgar. Even if the word "promulgated" was construed in a narrow sense of being a public declaration by an authority that a certain order had been made with respect to certain property, there was sufficient evidence in the case to show that the matter had been brought to the notice of the parties and the public in general by beat of drum that the property had been attached and handed over to the possession of Supurdgar. Therefore the formality of a formal declaration was also gone through in this case. In the circumstances, I have no hesitation in holding that the conviction of the applicants under s. 188, I. P. C. is legally sound.

On the proved facts of the case the conviction of the applicants under s. 454, I. P. C. was richly deserved. I therefore uphold the order of the Sessions Judge and dismiss the application in revision. The applicants are on bail. They shall surrender to their bail and serve out the sentences awarded to them.

Revision dismissed.

APPELLATE CRIMINAL

Before Mr. Justice G. D. Sahgal and Mr. Justice
U. S. Srivastava*

BADRI PRASAD GUPTA

... APPELLANT ¹⁹⁶⁶ October, 19.

v.

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... RESPONDENT

Code of Criminal Procedure, 1898, s. 417(3)—"institution of case" and "taking of cognizance of a case"—difference—Complaint for offence under s. 408, I. P. C. filed in Court of Magistrate—Magistrate first thought to try it as warrant case but later on committed it to Court of Session—No termination of proceedings—case does not cease to have been instituted upon complaint—s. 417(3) applies.

There is difference between the terms "institution of a case" and the "taking of cognizance of a case". Institution of a case is an act of a suitor, while taking of cognizance is an act of the Court. A case is instituted when a suitor brings it before a Court, but cognizance is taken of an offence by a court when it decides to proceed with it. By instituting a case the suitor draws the attention of the Court to the offence and desires that the Court may take cognizance of it.

Ball was set rolling in this case before the Court of a Magistrate by the complaint of the appellant. The proceedings continued before him and ultimately he thought it fit to commit the accused to stand his trial before the Court of Session. By committing the accused to stand his trial in this manner the proceedings did not terminate but they continued before the Court of Session and the continuity having not been broken the case does not cease to have been instituted upon a complaint. Proceedings under s. 198-B, Cr. P. C. take their birth in the Court of Session itself on a Complaint. Proceedings for which the accused is committed to stand his trial before the Court of Session continue before that court on committal, but they have already taken their birth at an earlier stage before a Magistrate in one or other of the modes provided in s. 190, Cr. P. C.

Held, though the Court of Session took cognizance of the case on the order of committal of the accused to that Court, the case did not cease to be one instituted upon complaint within the meaning of sub-s. (3) of s. 417, Cr. P. C.

* While sitting at Lucknow.

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Kshepa Banshi Pande v. Lalit Kumar Sen Gupta. followed.
Case-law discussed.

Criminal Appeal No. 506 of 1964 against the order passed by Sri Prem Narain, Assistant Sessions Judge, Unnao, dated 13th May, 1964 in S. T. No. 33 of 1964.

Facts appear in the judgment.

P. N. Chaudhry, for the appellant.

D. N. Hatwal, for the opposite-party.

The following judgment of the Court was delivered by—

SAHGAL, J.:—The appellant who is a life member of the Shyam Lal Gupta Higher Secondary School, Nawabganj in the district of Unnao lodged a complaint against the respondent who was the Principal of that institution, in court of a Magistrate for an offence under s. 408, I.P.C. The Magistrate in the beginning wanted to try the case as a warrant case, but later on he thought it fit to commit the accused to stand his trial before the Court of Session. The accused was accordingly committed to the Court of Session and the Sessions Judge transferred the case to the Court of the Assistant Sessions Judge who has acquitted the respondent. It is in these circumstances that the appellant came to this court and moved an application under s. 417(3), Cr. P. C. for special leave to appeal from the order of acquittal. The leave having been granted, this appeal was filed which has been admitted and that is how it comes up before the Court for hearing.

A preliminary point was raised on behalf of the respondent that the appeal was not maintainable and that the provisions of sub-s. (3) of s. 417, Cr. P. C. did not apply to the case. Having heard the learned counsel, we overruled the preliminary objection and ordered the case to be heard on the merits. We now proceed to give our reasons for doing so.

(1) A.I.R. 1959 Cal. 595.

Sub-s. (3) of s. 417, Cr. P. C. reads:

"If such an order of acquittal is passed in any case instituted upon complaint and the High Court on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court."

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Our attention also was drawn to sub-s. (1), s. 417 which provides, in so far as it is relevant, that the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court.

The learned counsel pointed out that it was the absolute right of the State Government to instruct the Public Prosecutor in the case of an acquittal order passed either by the trial court or by an appellate court, to present an appeal against that acquittal. But if a case is instituted upon a complaint and the accused is acquitted, the complainant has to obtain special leave. Even in such a case an appeal may be filed without special leave provided the complainant is able to induce the State Government to direct the Public Prosecutor to present an appeal.

This being an appeal which has not been filed under sub-s. (1) of s. 417, but a case in which special leave was applied for, it was pointed out that such an application under sub-s. (3) could be moved only if the case giving rise to this appeal had been *instituted upon complaint* (the italicised is ours).

The learned counsel drew our attention to the provisions of ss. 193 and 198-B, Cr. P. C. and pointed out that there are two ways in which a Court of Session can take cognizance of any offence. It can take cognizance

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of any offence as a court of original jurisdiction when the accused has been committed to it by a Magistrate duly empowered in that behalf; it can also take cognizance of an offence in cases covered by s. 198-B on complaint also. The simple argument was that as it is not a case covered by s. 198-B but is a case covered by s. 193, Cr. P. C., it cannot be said that the order of acquittal was passed in a case "instituted upon complaint", and as such there was no occasion for any special leave being granted under sub-s. (3) of s. 417 which could be granted only in such cases. He also drew our attention to the provisions of s. 270, Cr. P. C. by pointing out that such cases are conducted by the Public Prosecutors before the Court of Session and not by a private party, it further indicates that such cases cease to be cases instituted upon complaint in which the complainants' can prosecute their cases. He referred to the provisions of s. 493, Cr. P. C. also and pointed out that if the Public Prosecutor is responsible for the conduct of the case, then if any person appoints a pleader to prosecute the case in any court, the Public Prosecutor shall conduct the prosecution and the pleader so appointed shall act therein under his directions which again indicates that overall charge of such a case will be that of the Public Prosecutor.

We were also referred to the provisions of s. 347, Cr. P. C. under which even at the last stage a Magistrate before signing judgment may commit the accused to stand his trial before the Court of Session if it appears to him that the case is one which ought to be tried by the Court of Session. Such a case also would come under s. 193, Cr. P. C. and it would be a case relating to an offence of which the Sessions Judge would take cognizance on committal and not on a complaint.

In short, the argument was that even though the appellant may have filed a complaint against the

respondent in the court of a Magistrate, but as the case was tried by an Assistant Sessions Judge and the cognizance of the offence was taken by the Court of Session on a committal order and not a complaint, the case cannot be said to have been "instituted upon complaint".

The argument loses sight of the difference between the terms "institution of a case" and the "taking of cognizance of a case". Institution of a case is an act of a suitor, while taking of cognizance is an act of the court. A case is instituted when a suitor brings it before a court, but cognizance is taken of an offence by a court when it decides to proceed with it. Thus while institution of a case is done by a suitor, the taking of cognizance is done by a court. By instituting a case the suitor draws the attention of the court to the offence and desires that the court may take cognizance of it. In order to see, therefore, as to how a case has been instituted, we have to look to the manner in which it has been brought before the court by the suitor. In what circumstances, how or when the court takes cognizance of a case will be beside the point.

Ball was set rolling in this case before the court of a Magistrate by the complaint of the appellant. Thereafter the proceedings continued before him and ultimately he thought it fit to commit the accused to stand his trial before the Court of Session. By the committing of the accused to stand his trial in this manner the proceedings did not terminate. They continued before the Court of Session and the continuity having not been broken, the case does not cease to have been instituted upon a complaint. The proceedings before the Sessions Judge were not fresh proceedings or proceedings apart from those before the Magistrate. They were a continuation of the proceedings before the Magistrate and if they were instituted before the

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Magistrate upon complaint, their nature would not change by the accused being committed to the Court of Session. Proceedings under s. 198-B, Cr. P. C. take their birth in the Court of Session itself on a complaint. Proceedings for which the accused is committed to stand his trial before the Court of Session, continue before that court on committal, but they have already taken their birth at an earlier stage before a Magistrate in one or other of the modes provided in s. 190, Cr. P. C. In the circumstances, the contention of the learned counsel for the respondent is not tenable that this cannot be said to be a case which was "instituted upon complaint".

The learned counsel relied on a number of authorities to support his contention. The first case on which he placed reliance is *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee* (1). In that case it has been laid down that when a petition of complaint is filed before a Magistrate, the Magistrate may take cognizance under s. 190 (1) (a) and proceed to examine the complainant under s. 200, and thereafter proceed according to the subsequent sections of the Code, or in the alternative, may not take cognizance and may instead send it to the police for investigation under the provisions of s. 156(3). It further lays down that before it can be said that any Magistrate has taken cognizance of any offence under s. 190(1)(a), he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of the Chapter. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of the Chapter, but for taking action of some other kind, e.g., ordering investigation under s. 156(3), or issuing

(1) A.I.R. 1950 Cal. 437.

a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence. The case, therefore, deals as to when it can be said that a Magistrate had taken cognizance of a case. The view expressed in this case of the Calcutta High Court was approved by the Supreme Court in *R. R. Chari v. The State of Uttar Pradesh* (1) when the following extract from that judgment was quoted with approval—

“What is ‘taking cognizance’ has not been defined in the Cr. P. C. and I have no desire to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under s. 190(1) (a), Cr. P. C. he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under s. 200, and thereafter sending it for enquiry and report under s. 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under s. 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence.”

Here against the case throws light only as to when a court can be said to have taken cognizance of a case.

The next case is again of the Calcutta High Court, namely, *Parul Bala Sen Gupta v. The State* (2). in this case the point was as to what the word “case” means under s. 553(1), Cr. P. C. and it was held that it is only when a report under s. 173 is made and the Magistrate

(1) A.I.R. 1951 S.C. 207 at p. 210. (2) A.I.R. 1957 Cal. 379.

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takes cognizance of the offence that a "case" is brought into existence and it is only then that the case is heard by the Magistrate within the meaning of s. 553 of the Code. Here again the Court was concerned with the meaning of the word "case" and as under s. 553 it was necessary that the case be heard, it was pointed out as to when can it be said that a case has been heard by a Magistrate. This case also does not decide the precise point before us as to when it can be said that a case has been instituted.

There is then a string of authorities on which the learned counsel placed reliance, namely, *S. K. Osman Gani v. Baramdeo Singh* (1), *B. V. Huchappa v. Venkataswamy* (2) and *K. Damodaran v. V. K. Sippi* (3).

In the Calcutta case (*Osman Gani v. Baramdeo*) (1) following observation made in *Parul Bala Sen Gupta's* case (4) of the same High Court, a Bench held that applying a similar meaning to the expression "any case instituted upon complaint" used in sub-s. (3) of s. 417 of the Code, it must mean only that class of cases where not only the complainant comes to court with a petition of complaint but the Magistrate takes cognizance of the offence or offences alleged on the basis of that complaint. Thus when the complainant came to court with a petition of complaint but the Magistrate did not take cognizance on that complaint but referred it to the police and then on receipt of a report from the police he took cognizance, it cannot be held that the case was one instituted on a complaint within the meaning of the expression in s. 417(3).

The Mysore High Court in *Huchappa's* case (2), following the above authorities held that it is not sufficient for the purposes of sub-s. (3) of s. 417 if merely a

(1) A.I.R. 1959 Cal. 145.

(2) A.I.R. 1960 Ker. 889.

(3) A.I.R. 1960 Mys. 172.

(4) A.I.R. 1957 Cal. 379.

complaint had been made and an order of acquittal has been subsequently passed; it is also necessary that such an order of acquittal should have been passed in a "case" instituted upon complaint. Until a Magistrate has taken cognizance of an offence, there is no "case" before the Magistrate. The mere fact that there is a complaint before a Magistrate is not equivalent to there being a "case" before the Magistrate. Where the Magistrate upon such a complaint orders investigation under s. 156(c) which results in the police placing a charge-sheet and the Magistrate proceeds on the charge-sheet and acquits the accused, the acquittal is not on a case instituted upon a complaint, and, therefore, s. 417(3), Cr. P. C. would not entitle the complainant to apply for special leave to appeal.

In *K. Damodaran's* case (1) the Kerala High Court also, following the aforesaid authorities, held that the words "in any case instituted upon complaint" appearing in s. 417(3) mean "in any case of which the Court has taken cognizance upon complaint" and "complaint" does not include a police report.

The ratio of all these cases is that a "case" comes into being only when a court takes cognizance and so long as no cognizance is taken by a court, there being no case, no question of a "case instituted upon complaint" arises.

On the strength of these authorities it was urged that as the case came before the Court of Session only on an order of committal by the Magistrate which the Court of Session took cognizance of, the case was born, as it were at that stage and as its birth did not arise out of any complaint but it came into being as a result of a committal order, it cannot be said that it was "instituted upon complaint".

(1) A.I.R. 1960 Ker. 389.

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We are not prepared to accept this argument. The case started on a complaint filed by the appellant before the Magistrate who took cognizance of the offence relating to which the complaint was filed against the respondent. He had first thought it fit to try it as a warrant case, but later he thought that it would be better if the accused was to stand his trial before the Court of Session. When the case came up before the Court of Session after committal it was the same case, for it had to be committed to that court as the Magistrate thought that he could not adequately deal with it. The case, therefore, did not come into being only on its being taken cognizance of by the Sessions Judge, but it was already in existence. The cases, therefore, on which reliance has been placed by the learned counsel for the respondent did not apply to such a case. They all relate to cases before a Magistrate in whose court they were instituted.

Apart from it, we are not in agreement with the view expressed in some of the authorities, referred to above, that a case is instituted only when it is taken cognizance of.

Under s. 190(1) a Magistrate may take cognizance of any offence (a) upon receiving a complaint of facts which constitute such offence; (b) upon a report in writing of such facts made by any police officer; (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed. We may leave out (c) for the present. Thus cognizance may be taken by a Magistrate upon receiving complaint of facts or upon a report made by a police officer. Apart from the method contemplated by cl. (c) with which we are not concerned, there are two methods of the case being brought to the notice of the Magistrate, namely, by a complaint or by a police report. The Magistrate may take cognizance or

he may not take cognizance on receiving a complaint or upon a police report, but the case is conceived as soon as a complaint is filed or a police report is made before him. If he does not take cognizance of the offence, then the case in either of these two cases is still-born. If ultimately the Magistrate does take cognizance of the offence, though the case starts from the stage at which cognizance is taken, it does not cease to be instituted upon complaint or upon a police report. Though it is born and it starts on the offence being taken cognizance of, it remains in the womb, as it were, prior to its being taken cognizance of, being conceived on the filing of the complaint or the submitting of the police report. So as soon as it is born by being taken cognizance of, it can safely be said to have been born as a result of the institution of the complaint or of the submitting of the police report. We are, therefore, in respectful agreement with the view expressed in *Kshetrabanshi Panda v. Lalit Kumar Sen Gupta* (1) that in a case where the appellant filed a petition of complaint and upon the complaint the Magistrate ordered the petition of complaint to be sent to the Officer-in-charge of the police station for necessary action and as a result of the investigation by the police a charge-sheet came into existence, it could be safely concluded that the case was instituted upon a complaint. In such a case, no doubt, cognizance was taken by the Magistrate on the police report itself, but the Magistrate called for the report of the police on the complaint instituted in his court and it is through the complaint that the suitor approached the court for proceeding in the matter. The court might not have thought it fit to start the proceedings on the complaint itself, but might have thought it necessary to obtain a police report also and the police may have charge-sheeted the accused, but though the cognizance was taken by the Magistrate after the charge-sheet of the police was submitted before him, as the proceedings were in the

(1) A.I.R. 1953 Cal. 595.

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first instance initiated in his court on the petition of complaint by the complainant, it could not be said that the case had not been instituted upon complaint but had been instituted on a charge-sheet submitted by the police. In the instant case also, though the Court of Session took cognizance of the case on the order of committal of the accused to that court, the case did not cease to be one instituted upon complaint.

For the reasons stated above, as we were of opinion that the preliminary objection had no force, we overruled it.

Objection overruled.

APPELLATE CIVIL

Before Mr. Justice G. D. Sahgal and Mr. Justice
L. Prasad*

SEWA SINGH (RESPONDENT-APPELLANT)

v.

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October, 18.

S. SOHAN SINGH AND OTHERS (RESPONDENTS)

Judgment—Pronouncing of—judgment reserved—cannot be pronounced without fixing a date and giving notice to the parties effected—Motor Vehicle Act, 1939, s. 64-A—Limitation for revision—Computation of.

Once a judgment is reserved it cannot be pronounced without fixing a date for its pronouncement and giving a notice of that date to the parties concerned. If it is subsequently pronounced without complying with that requirement, may be on the very date on which it was earlier reserved, it can have no effect in the eye of law till notice of it is given to the parties effected by it.

The R. T. A. having heard the item, reserved the judgment on 19th April, 1965 but subsequently announced it on that very day without giving intimation to the party affected and the party could know about the order on May 6, 1965.

Held, though the order may have been passed on April 19, 1965 it would be deemed to have been passed on 6th May, 1965 for the purpose of computing limitation for revision under s. 64-A, Motor Vehicles Act.

Special Appeal No. 108 of 1966 against the order dated February 8, 1966 passed by NIGAM; J. in Writ Petition No. 619 of 1965.

R. K. Agarwal, for the appellant.

The following judgment of the court was delivered
by—

*While sitting at Lucknow.

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L. PRASAD, J.:—We have heard at some length learned counsel for the appellant in this special appeal. The only point that calls for determination in the appeal is as to whether in the circumstances of the particular case as noticed in the judgment of the learned single Judge the order of the R. T. A. dated 19th April, 1965 is to be deemed to have been passed on 6th May, 1965 on which date respondent no. 1 was given intimation about it by the R. T. A. As pointed out by the learned single Judge it was conceded by the Secretary, R. T. A., in his comments submitted to the State Transport Authority respondent no. 2 that on 19th April, 1965 after the particular item namely item no. 18-C was heard it was announced that the judgment was reserved. That being so, it is obvious that the order, which, as it appears from the order itself, came to be announced on that very date, namely 19th April, 1965, was passed without any notice to respondent no. 1 who had earlier been given to understand that the judgment was reserved and was consequently to be passed on a date to be notified to him. As appears from the record there was no intimation to respondent no. 1 of this order till letter dated 6th May, 1965 was addressed to respondent no. 1 informing him about the order and requiring him not to ply the bus. In these circumstances no exception can be taken in our opinion to the view of the learned single Judge that even though the order may have been passed on 19th April, 1965, it would be deemed to have been passed on 6th May, 1965, for the purposes of computing limitation for revision to be filed by respondent no. 1. Once a judgment is reserved it cannot be pronounced without fixing a date for its pronouncement and giving a notice of that date to the parties concerned. If it is subsequently pronounced without complying with that requirement, may be on the very date on which it was earlier reserved, it can have no effect in the eye of law till notice of it is given to the parties affected by it. In

that view of the matter even though it may be correct to say that limitation under s. 64-A of the Motor Vehicles Act is to be computed from the date of the order and not from the date of the knowledge of the order, we see no fault in the finding recorded by the learned Single Judge that in the peculiar circumstances of the present case the date of the order will be deemed to be 6th May, 1965 and not 19th April, 1965. No other point arises in the Special Appeal. We see no substance in it and dismiss it summarily.

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Appeal dismissed.

APPELLATE CIVIL

*Before Mr. Justice L. Prasad and Mr. Justice
R. Chandra**

1966
October, 27.

KARTAR SINGH (PETITIONER-APPELLANT)

v.

STATE OF UTTAR PRADESH AND OTHERS
(OPPOSITE-PARTIES-RESPONDENTS)

U. P. (Temporary) Control of Rent and Eviction Act, 1947,
s. 7-F—Power of revisional authority—Possession delivered to
allottee during pendency of revision—Revision cannot fail—
State Government competent to cancel allotment order.

The revisional authority is as much free to deal with the question of allotment as the District Magistrate was himself free at the time he passed the order of allotment. It is impossible to sustain the contention that a revision filed under s. 7-F must fail merely because during its pendency the possession has been delivered to the allottee. If the State Government has power to revise an order of allotment under s. 7-F and if the State Government in exercise of that power comes to a conclusion that the order of allotment deserves to be set aside, it has but to set it aside.

Special Appeal No. 156 of 1965 against the judgment and order dated November 30, 1965, passed by SAHGAL, J.

H. D. Srivastava, Umesh Chandra and S. P. Pathak,
for the appellant.

The following judgment of the court was delivered by—

L. PRASAD, J.:—We have heard the learned counsel for the appellant in this special appeal. The contention of the learned counsel is that in so far as under the order of allotment passed under s. 7 of the U. P. (Temporary)

*While sitting at Lucknow.

Control of Rent and Eviction Act, possession had been delivered to the allottee during the pendency of the revision filed under s. 7-F of the Act, the State Government was not competent to cancel the order of allotment as it did by the impugned order a copy of which is Annexure 9. The argument is that just as the authority passing the order of allotment is not competent to cancel that order after the order has exhausted itself in the sense that possession has thereunder been delivered to the allottee the State Government is also incompetent to cancel the order of allotment subsequent to the delivery of possession under the order of allotment. We see no substance in the contention. As has been pointed out by the learned Single Judge with reference to the cases referred to in his judgment, that the said limitation placed on the power of the District Magistrate to cancel an order of allotment passed by himself, proceeds on the ground that he possesses no power as such except on the basis of s. 21 of the U. P. General Clauses Act. Since the order of allotment is in the nature of an administrative order, he can exercise it only so long as the order is in existence, that is, so long as it has not exhausted itself by virtue of the delivery of possession having been made to the allottee. It is impossible to import a similar limitation on the power of the revisional authority acting under s. 7-F of the Act. The revisional authority is as much free to deal with the question of allotment as the District Magistrate was himself free at the time he passed the order of allotment. It is impossible to sustain the contention that a revision filed under s. 7-F must fail merely because during its pendency the possession has been delivered to the allottee.

The other points urged were that the State Government did not afford any opportunity to the appellant and furthermore there is no provision in the Act to entitle to State Government to cancel the order of allot-

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ment. We see no substance in any of these two points. As pointed out by the learned Single Judge the appellant was given an opportunity to show cause against the revision preferred by the opposite-parties and the appellant actually filed a rejoinder. So far as the other point is concerned we are unable to appreciate it at all because if the State Government has power to revise an order of allotment under s. 7-F and if the State Government in exercise of that power comes to a conclusion that the order of allotment deserves to be set aside, it has but to set aside. The provision of s. 7-F itself implies that power.

No other point has been urged.

We, therefore, dismiss it summarily.

Since the appeal has been dismissed, the Civil Miscellaneous Application No. 2 (W) of 1965 is rejected.

Appeal dismissed.

CRIMINAL MISCELLANEOUS

Before Mr. Justice Gyanendra Kumar

STATE OF U. P. (APPLICANT)

v.

RAGHUBIR SAHAI KAITHWAR,
(OPPOSITE-PARTY)

1966

November,
8.

Contempt of Courts Act, 1952, s. 3—*Scandalising the court—If Contempt of Court—Publication of pamphlet attributing motive—If fair and bona fide criticism.*

It is true, in suitable cases fair and *bona fide* criticism of judicial acts of the court may sometime be permitted. But where scandalising the court by publication and distribution of pamphlets tends to bring the authority of the court into disrespect and offers insult to the judicial officer and diminishes his dignity and prestige and shakes the confidence of the general public in the impartial administration of justice, it can not be permitted.

Where the pamphlet among others, attributed motives for having acted against the contemner on considerations other than judicial and on extraneous advice of District Magistrate, Reader and Ahalmad and Inspector of the Court, *held*, that such imputations are bound to impair the image of justice and is a contempt of the court.

Criminal Miscellaneous Contempt Case No. 13 of 1966.

Government Advocate, for the Applicant.

K. P. Agarwal and C. S. Saran, for the Opposite-Party.

GYANENDRA KUMAR, J.:—The opposite-party, Raghubir Sahai Kaithwal, is an M. L. A. from Fatehpur. The admitted facts are that a case under s. 323, I. P. C. was instituted against Ram Saran *alias* Lallan at the instance of the opposite-party (*State v. Ram Saran*) and was pending in the court of Shri Dinesh Mohan Arya, Judicial Magistrate, Bindki at Fatehpur. The opposite-party was the main prosecution witness in the case; but he was disbelieved with the result that the Magistrate ac-

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quitted the accused. In his judgment, the Magistrate passed scathing remarks against the opposite-party and awarded a compensation of Rs.500 to be paid to Lallan accused. Against the said order the opposite-party filed an appeal before the Sessions Judge which is still pending. He also came to this Court for expunction of adverse remarks against him. By its order dated the 14th April, 1966 this Court expunged only one word from the remarks of the Magistrate but maintained the rest.

Soon after the Magistrate had awarded compensation to Lallan aforesaid, the opposite-party distributed a printed pamphlet on 28th November, 1965 in which, *inter alia*, he alleged that the Magistrate, Shri Dinesh Mohan Arya, depends upon the mercy of the District Magistrate and acts according to the latter's directions, that he also acts upon the advice of his Reader, Ahalmad and Court-Inspector and that the three officials aforesaid bring to bear their influence, in getting certain wrong and unjust orders passed by the said Presiding Officer, which are set aside in appeal by the Sessions Judge and the Commissioner and further that, in order to avoid his judgments being challenged before the appellate courts, the Magistrate ante-dates his judgments; that the opposite-party had exposed the nefarious deeds of the District Magistrate and others by distributing pamphlets as also raising questions in the Assembly and by addressing several complaints to the Chief Minister. However, on account of the fact that the Chief Minister did not consider the allegations to be correct, the District Magistrate and others, in order to take revenge through the agency of the 'Yes-man' Judicial Officer, and with a desire to belittle and injure him, entered into a conspiracy. The pamphlet goes on to say that whatever the Magistrate has done, through the co-operation of his Reader, Ahalmad and Court-Inspector as well as of one or two favourite vakils, has not only exposed the manner

of his administration of justice but has also shown how high the family status of the Judicial Magistrate would be, who considers notorious gangsters, drunkards and bullies to be greater leaders than the legislators.

The Judicial Magistrate accordingly addressed a letter to the Additional District Magistrate, Fatehpur on 3rd January, 1966, for necessary action in the matter. The Additional District Magistrate, in his turn, referred the matter to the Registrar of this Court on 6th January, 1966, whereupon proceedings under the Contempt of Courts Act were started against the opposite-party by this Court.

There can be no doubt that in the instant case the alleged contempt would fall in the category of scandalising the court and impairing its dignity in the eyes of the people who are likely to lose confidence in the dispensation of justice by the Judicial Magistrate in question.

The opposite-party has filed a long counter-affidavit explaining his conduct and has asserted that the same did not amount to contempt of court. At the end, however, it is stated that if this Court comes to the conclusion that the opposite-party is guilty of contempt, then he throws himself at its mercy and begs to be excused, inasmuch as he never intended to bring into contempt the courts established by law in this Country.

Shri C. S. Saran, learned counsel for the opposite-party, has not challenged that the contents of the pamphlet published by his client amount to scandalisation of the Magistrate, in the discharge of his judicial functions. What he really contends is that scandalising a court has ceased to be contempt. In support of this theory, *Shri Saran* invited my attention to three foreign decisions: The first one is *In the matter of Special Reference from the Bahama Islands* (1). In that case a letter was published in a Colonial newspapers containing criticism of the conduct of the Chief Justice of the

(1) 1898 Appeal Cases 138.

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colony, whereupon the editor of the paper was sentenced for contempt of court. On reference being made to their Lordships of the Judicial Committee, they came to the conclusion that the nature of the contents of the letter published in the newspaper were such that it might have been made the subject of proceedings for libel, but was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of law. I am afraid, this case has no application here, inasmuch as apart from casting aspersions on the personal conduct and character of the Judicial Magistrate, the opposite-party has also indulged in attributing motives to him in the discharge of his judicial functions, which were said to be governed or directed by persons like the District Magistrate, the Reader, the Ahalmad and the Court-Inspector.

The second case is *Mcleod v. St. Aubyn* (1). In this ruling Lord MORRIS delivering the judgment of the Board said—

“Committals for contempt of Court are ordinarily in cases where some contempt *ex facie* of the Court has been committed, or for comments on cases pending in the Courts. However, there can be no doubt that there is a third head of contempt of Court by the publication of scandalous matter of the Court itself. Lord HARDWICKS so lays down without doubt in the case of *in re Read and Hugonson* (2). He says, “One kind of contempt is scandalising the Court itself.” The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the Judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly,

(1) 1899 Appeal Cases 549.

(2)

and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the Judge or the jury are given over to criticism.

It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion, attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court."

It is note-worthy that even though the learned Lord, thought that committals for contempt of Court by scandalising the Court itself had become obsolete in England, he was of the opinion that in the colonies the principle did not apply. Whatever be the position in western democracies like England, the position of law and the circumstances obtaining in this country are entirely different. The democracy in India is less than two decades old, where a vast majority of the population is still illiterate and sadly sufferers from lack of responsibility and propriety. The social and economic conditions of the public in India are again such that it would be very dangerous to grant them the liberty of scandalising the courts in unbridled manner. It is true that even in India, in suitable cases fair and *bona fide* criticism of the judicial acts of the court may some time be permitted. But where scandalising the court by

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means of publication and distribution of pamphlets tends to bring the authority of the court into disrespect and offers insult to the Judicial Officer concerned and diminishes his dignity and prestige in the eyes of the people in general and shakes their confidence in the impartial administration of justice by him, such a weapon cannot be left in the hands of the litigants or the members of the public. In the instant case, the opposite-party has attributed improper motives to the Magistrate and has actually alleged that he is giving unjust decisions, under the pernicious influence of his Reader, Ahalmad and Court-Inspector in order to wreak his vengeance against the opposite-party, inasmuch as he had put questions on the floor of the Assembly and had also made repeated complaints to the Chief Minister against the District Magistrate and the Judicial Magistrate. Such a conduct might by no means be called detached or fair criticism of judicial acts of the officer concerned, but is obviously inspired and motivated by a sense of gratifying his spleen against the alleged misdeeds and wrong decisions of the Court.

The third case is a decision of the High Court of Australia, viz. *The King v. Nicholls* (1), wherein it was observed:

"The statements made concerning a Judge of the High Court do not constitute a contempt of the High Court unless they are calculated to obstruct or interfere with the course of justice, or the due administration of the law, in the High Court."

The facts giving rise to that case were that on 7th April, 1911, there was printed and published in a newspaper called 'The Mercury' an article reading "Mr. Justice HIGGINS is, whether believed, what is called a political judge, that is, he was appointed because he had well-served a political party. He, moreover, seems to know

his position, and does not mean to allow any reflections on those to whom he may be said to be indebted for his judgeship." Accordingly contempt proceedings were taken against the editor of that paper. In the course of the hearing of a case, which was pending before HIGGINS, J., one of the counsel described the Broken Hill labour organisations as "the most tyrannical that he had known", and he added "moreover, they are encouraged by their Union and the Government of this Country". Whereupon HIGGINS, J. observed:

"I will not allow you to speak in that way of the Government of this Country I will not allow you to speak in that form of a Government of the country and those above us. If you do not comply with my rules you will leave the Court"

This led to the publication as referred to above. It was in these circumstances that the High Court of Australia ruled that the act of the editor did not amount to contempt of Court.

It may be noted that the article which was in question in *Nicholls'* case (1) only related to the status of the Judge, and the way he was appointed to that post by political influence. There was no reflection on his judicial competence; nor was it suggested that his political affinity, in any way, interfered with impartial administration of law and justice in his court.

At any rate, the concept of this branch of law, i.e. contempt of Court by scandalising court, as modified in England or Australia has no application in India where the law of the land is the one laid down by the Supreme Court of India.

In *Aswani Kumar Ghose v. Arabinda Bose* (2) *The Times of India* in a leading article wrote as follows regarding the decision of the Supreme Court:

(1) 1911 Commonwealth L.R. 280. (2) A.I.R. 1958 S.C. 75.

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" . . . There is a tell tale note at the top of the rules framed by the Supreme Court for enrolment of advocates and agents to the effect that the rules were subject to revision and the judges had under consideration a proposal for abolishing the dual system. Abolish it by all means if the system has outgrown its usefulness and is found incongruous in the new setting of a democratic constitution. But to achieve a dubious or even a laudable purpose by straining the law is hardly edifying. Politics and policies have no place in the pure region of the law; and courts of law would serve the country and the constitution better by discarding all extraneous considerations and uncompromising by observing divine detachment, which is the glory of law and the guarantee of justice."

MAHAJAN, J. delivering the judgment of the court said :

"No objection could have been taken to the article had it merely preached to the Courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the Judges, it not only transgressed the limits of fair and 'bona fide' criticism but had a clear tendency to affect the dignity and prestige of this Court. The article in question was thus a gross contempt of Court. It is obvious that if an impression is created in the minds of the public that the Judges in the highest Court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined "

Their Lordships also relied upon the decision in the case of *Andre Paul v. Attorney General of Trinidad* (1), wherein it was held :

(1) A.I.R. 1986 P.C. 141.

"The path of criticism is a public way; the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune."

I have already held above that the pamphlets distributed by the opposite-party, who is supposed to be a responsible representative of the people in the legislature, contained not only criticisms of the person and morals of the judicial officer concerned, but out of malice also attributed motives to him for having acted against the opposite-party, on considerations other than judicial, in deciding cases on the extraneous advice of the District Magistrate, the Reader, the Ahalmad and the Court Inspector of his court. Such an imputation against the judicial conduct of a court is bound to impair the image of justice in the minds of the common people with regard to the Judicial Magistrate concerned. Similar view was taken by the Supreme Court of India in *M. Y. Shareef v. Hon'ble Judges of the Nagpur High Court* (1).

Therefore the opposite-party stands clearly indicted for the contempt of the court of the Judicial Magistrate, Bindki, Fatehpur. The opposite-party has been working as a petition writer and is an M. L. A. since 1962. It is regrettable that a person intimately connected with the courts of law over a number of years and who has been acting as a legislator for good four years, should have chosen to act in the manner that he did. He however, states that he has a large family to maintain and expresses apology. I, therefore, think that the imposition of fine of Rs.200 on the opposite-party shall meet

(1) A.I.R. 1955 S.C. 19.

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the ends of justice. I order accordingly. He shall pay the same as well as costs amounting to Rs.80 to the petitioner, within a period of one month. He shall also pay Rs.80 as costs to the Assistant Government Advocate, Shri M. M. Chaturvedi, within the same period. In case of default of payment of fine, he shall undergo simple imprisonment for two weeks. He is further warned to be more careful in future.

Contempt Case allowed.

APPELLATE CIVIL

Before Mr. Justice Sahgal and Mr. Justice L. Prasad*

BALDEO AND ANOTHER (PLAINTIFFS-APPELLANTS)

v.

CHARAM (DEFENDANT-RESPONDENT)

1966

November 8,

U. P. Zamindari Abolition and Land Reforms Act, 1951, ss. 209, 211-A, 229-D, and 331—Suit under s. 211-A(6) for injunction and in alternative for possession and mesne profits—Jurisdiction—If lies in Civil Court.

Suit for possession subsequent to dispossession—Not covered by s. 209—S. 331 does not apply—Civil Court can take cognizance;

Suit prior to dispossession—If proceedings under s. 211-A initiated on the grounds contemplated under s. 167 or s. 206—Relief for declaration available under s. 229-D—S. 331 applies—Civil Courts jurisdiction barred—If proceedings under s. 211-A initiated on the ground under s. 210(1)—Relief not available under s. 229-D—S. 331 does not apply—Civil Court can take cognizance.

A suit for possession brought subsequent to the plaintiff's dispossession under an order passed in proceedings under s. 211-A would not at all be a suit of the nature covered by s. 209 of the Act but would be a suit of a completely different nature and would thus be cognizable by a civil court because s. 331 of the Act would not at all apply to bar its cognizance by the civil court. But if the plaintiff was in possession of the disputed land and only an order of ejectment under s. 211-A had been passed against him, then s. 331 of Z. A. & L. R. Act will apply only if it is possible to hold that such a suit is in respect of a cause of action for which relief can be had from the revenue court by filing a suit for declaration under s. 229-D of the Act.

If the proceedings under s. 211-A were initiated on any of the grounds contemplated under s. 167 or s. 206 it would be possible for the appellant to claim the relief of declaration under s. 229-D, alleging that he was sirdar of the land still as he had not made any transfer or did any act of perversion, and as such s. 331 would apply as a bar to the cognizance of the suit by the civil court.

*While sitting at Lucknow.

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But if the proceedings under s. 211-A, were taken against the appellants on the ground that he was sirdar having acquired such rights under s. 210(1), the position would be different because in that case he would still be the sirdar of the land, and would have no occasion to seek a relief of declaration to that effect and such a suit (against the order passed under s. 211-A) would not be covered by s. 229-D and as such s. 331 would not be a bar to its cognizance by the civil courts.

F. A. F. O. No. 56 of 1964 against the judgment and order dated October 22, 1964 passed by S. P. Misra, Civil Judge, Hardoi in Civil Appeal No. 26 of 1964.

The facts appear in the judgment.

S. P. Misra, for the appellant.

R. N. Misra, for the respondent.

The following judgment of the court was delivered by—

SAHGAL, J.:—This appeal has been referred to us for disposal by a learned single Judge of this Court as the sole question involved therein relating to jurisdiction is of great general importance and merits an authoritative decision by a Bench of this Court.

The suit giving rise to this appeal was filed in the Court of the Munsif East, Hardoi by the appellants against the respondents praying for an injunction that the defendants be restrained from interfering with the exercise of sirdari rights by the plaintiffs over the land in suit and with their possession thereon and not to destroy the crop of *bajra* sown by the appellants standing thereon. In the alternative, it was prayed that if during the pendency of the suit the defendants take possession over the land and destroy the crops standing thereon or damage it, a decree for possession also be passed in their favour and *pendentelite* and future *mesne profits* be also decreed.

Of the appellants, appellant no. 1 claimed himself to be the sole sirdar of plot no. 19/1, while as to the other plots in the suit, both the appellants claimed

themselves to be *sirdars* jointly. Their complaint was that Chhota, defendant-respondent no. 6, had in collusion with the Gram Samaj and Lekhpal got his name entered over plots nos. 4 and 5 and on the basis of the said entry wanted to interfere with the possession of the plaintiffs and that the Gram Samaj got proceedings under s. 211-A of the U. P. Zamindari Abolition and Land Reforms Act initiated against them which eventually resulted in an order being passed against them. It was in these circumstances that this suit was filed.

The parties went to trial in the trial court on a number of issues, one of the issues being as to whether the civil court had jurisdiction. The learned Munsif decided in favour of the plaintiffs and entertained the suit. There was an appeal to the District Judge which was transferred to the Civil Judge, Hardoi who allowed the appeal and set aside the judgment of the trial court that the suit was cognizable by the civil court directing that the record be sent back to the trial court for returning the plaint to the plaintiffs for presentation to the revenue court. This appeal is directed against that order of the learned Civil Judge.

We have, therefore, to see whether the suit was cognizable by a civil court where it was instituted or is it that it should have been instituted in the revenue court.

The plaintiffs-appellants are aggrieved by an order passed against them under s. 211-A of the Zamindari Abolition Act. This section provides for a summary procedure for ejectment of persons occupying land without title. Under sub-s. (1) of this section where on an application from the Chairman, member or Secretary of the Land Management Committee or on facts coming to his notice otherwise, the Collector is satisfied that any person who is liable to ejectment on the suit of the Gaon Sabha otherwise than under s.

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212 continues to be in possession of the land otherwise than in accordance with the provisions of the Act or has transferred possession of the land to any other person, the Collector may, if he thinks that it is necessary to do, issue a notice to such person and to every other person in possession through him to appear within a time to be fixed by him and to show cause why an order of ejectment be not made against them. Under sub-s. (2) the Gaon Sabha and all other persons interested in the land have to be made a party in all such proceedings. Under sub-s. (3) where the person does not appear in pursuance of the notice under sub-s. (1) or if he appears but does not contest the notice, the Collector may make an order for the ejectment of such person and every other person claiming possession through him. Sub-s. (4) provides that if the person appears in pursuance of the notice under sub-s. (3) and files any objection, the Collector shall proceed to hear the Gaon Sabha and the objector and any evidence which they may adduce. Under sub-s. (5) if the Collector is satisfied that such person is liable to ejectment as aforesaid, he shall pass an order for ejectment of such person and every other person in possession through him. Sub-s. (6) further provides that where an order for ejectment has been passed, the person against whom the order has been passed, may institute a suit to establish the right claimed by him but subject to the results of such suit the order passed under sub-s. (3) or (5) shall be conclusive.

This suit being against an order under s. 211-A has obviously been filed under sub-s. (6) of s. 211-A with the prayer above referred to, namely, the prayer for an injunction and, in the alternative, for possession and *mesne profits*. It is to be seen whether this could be filed in the civil court or is it that it should have been filed in the revenue court.

S. 331 of the Zamindari Abolition Act provides that no court other than a court mentioned in col. 4 of Sch. II shall, notwithstanding anything contained in the Civil Procedure Code, 1908, take cognizance of any suit, application or proceedings mentioned in col. 3 thereof, or of a suit, application or proceeding based on a cause of action in respect of which any relief could be obtained by means of any such suit or application. It also provides in an explanation that if the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical to that which the revenue court would have granted.

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Thus the contention on behalf of the defendants-respondents is that it is immaterial that the relief of injunction asked for in the suit cannot be granted by the revenue court but as the cause of action is one in respect of which a relief for declaration may be granted by the revenue court under s. 229-B of the Zamindari Abolition Act, s. 331 of the Act would still apply as a bar to its cognizance by the civil court as this relief is one that can be granted under serial no. 34 of Sch. II of the Act by an Assistant Collector of the First Class which is a revenue Court.

As to the relief for possession, the argument is that the suit would be covered by s. 209 of the U. P. Zamindari Abolition and Land Reforms Act and, as such a suit also can be filed before an Assistant Collector of the First Class in view of serial no. 24 of the same Schedule, s. 331 of the Act would apply and would bar its cognizance by the civil court.

We have thus to examine how far, if at all, these contentions are correct.

Under sub-s. (1) of s. 211-A of the Zamindari Abolition Act notice of ejectment can be issued only to

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persons who are liable to ejectment on the suit of the Gaon Sabha otherwise than under s. 212 if they continue to be in possession of the land otherwise than in accordance with the provisions of the Zamindari Abolition Act or they have transferred possession of the land to any other person.

The appellants claim to be *sirdars* of the land in dispute. Assuming that they are *sirdars*, it is only under s. 201 of the Zamindari Abolition Act that they would be liable to ejectment from their holding on the suit of the Gaon Sabha. They can be so liable to be ejected on any of the grounds mentioned in ss. 167, 206 or 212 of the Zamindari Abolition Act.

There is yet another provision under which a *sirdar* can be ejected by the Gaon Sabha and it is s. 211. S. 211-A will not apply to cases, as specifically provided therein, which are covered by s. 212. Let us, therefore, examine the provisions of ss. 167, 206 and 211 of the Act.

S. 167 provides that where a *sirdar* (we are not concerned with *asami* in this case) has made any transfer in contravention of the provisions of the Act, the transferee and every person who may have thus obtained possession of the whole or part of the holding shall be liable to ejectment.

Under s. 206 the liability for ejectment arises on the using of land for any purpose other than a purpose connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming.

Under s. 211 any person who becomes a *sirdar* under the provisions of s. 210(1) becomes liable to ejectment. Under s. 210 if a suit is not brought under s. 209 or a decree obtained in any such suit is not executed within the period of limitation provided for the filing of the

suit or the execution of the decree, the person taking or retaining possession shall, where the land forms part of the holding of a *bhumidar* or *sirdar*, become a *sirdar* thereof. Thus if a person becomes a *sirdar* under this provision of law, he becomes liable to ejectment.

In short, action under s. 211-A of the Zamindari Abolition Act can be taken against a *sirdar* only if he has made a transfer in contravention of the provisions of the Act or has used the land in contravention of the provisions of the Act. It can also be taken against a *sirdar* who derives his right as such on a suit not being brought against him under s. 209 or on a decree obtained in any such suit being not executed against him, within the period of limitation provided for the filing of the suit or the execution of the decree as the case may be.

The nature of the right to file a suit on the basis of which a suit for ejectment is filed in the three cases is, however, different which will appear from the following discussion.

Under s. 190 of the Act, in so far as it is relevant, the interest of a *sirdar* in a holding or any part thereof would cease when the holding or part thereof has been transferred, let out or used in contravention of the provisions of the Act or when he has been ejected in accordance with the provisions of the Act.

A suit under s. 167 is filed against a *sirdar* when he has made any transfer in contravention of the provisions of the Act.

Under s. 190 of the Act as soon as he has made such a transfer, his interest as *sirdar* would cease.

Under s. 206 of the Act a *sirdar* becomes liable to ejectment for using land for any purpose other than a purpose connected with agriculture, horticulture or animal husbandry, etc. Under s. 190 such a *sirdar* also

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ceases to be a *sirdar* as soon as he has used the land in contravention of the provisions of the Act.

Under ss. 167 and 206, therefore, the Gaon Sabha becomes entitled to file a suit because the *sirdar* has ceased to be the *sirdar* of the land, for if the suit is filed, the basis of the suit is his ceasing to be *sirdar* of the land by his acting in contravention of the provisions of the Act by either transferring the land against those provisions or perverting it.

The suit contemplated under s. 211, however, is a suit against a *sirdar* himself by virtue of his being a *sirdar* who has acquired his rights as such under s. 210(1) of the Act.

Thus while a suit contemplated under ss. 167 and 206 of the Zamindari Abolition Act is filed because the defendant has ceased to be a *sirdar*, the basis of the filing of a suit under s. 211 is that the *sirdar* against whom such a suit is filed belongs to a particular class of *sirdars*.

There has been some controversy in this case regarding the nature of the order of ejectment passed necessitating the institution of the suit giving rise to this appeal. However, in view of the certified copy of the notice (Ex. 14) and the certified copy of the order-sheet, dated the 6th of March, 1962 (Ex. A-1), it is clear that the order of ejectment was passed against the appellants in proceedings under s. 211 of the Act.

The allegations in the plaint indicate that the suit came to be instituted prior to the appellants' actual ejectment in furtherance of the order of ejectment passed against them in proceedings under s. 211-A of the Act. There was thus no occasion to seek relief for possession in the suit. In case it had been filed subsequent to the actual ejectment of the plaintiffs-appellants, it would have been obligatory for them to seek a relief for possession. This brings us to the contention raised on

behalf of the respondents that such a suit for possession would be covered by s. 209 of the Zamindari Abolition Act. That contention appears to be without any substance. A perusal of s. 209 would bear out that a suit for possession under it can be maintained only against a person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force. In a case where dispossession is effected in execution of an order of ejectment passed in proceedings under s. 211-A, the person dispossessed can by no means maintain that the person put in possession has taken or retained possession of land otherwise than in accordance with the provisions of law for the time being in force. It would rather be just the other way, i.e. the person thus put in possession would be taking or retaining the land in accordance with the provisions of s. 211-A.

It thus follows that a suit for possession brought subsequent to the plaintiff's dispossession under an order passed in proceedings under s. 211-A would not at all be a suit of the nature covered by s. 209 of the Act but would be a suit of a completely different nature and would thus be cognizable by a civil court because s. 331 of the Act would not at all apply to bar its cognizance by the civil court.

Coming back now to the position that the suit giving rise to this appeal has on the very allegations in the plaint been filed at a time when the plaintiffs-appellants were in possession of the disputed land and only an order of ejectment under s. 211-A had been passed against them, we have to see if its cognizance by the civil court is barred by s. 331 of the Zamindari Abolition Act. This provision of law will apply only if it is possible to hold that such a suit is in respect of a cause of action for which relief can be had from the revenue

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court by filing a suit under s. 229-B of the Zamindari Abolition Act under which a suit for declaration can be filed in the revenue court.

There is nothing on record to indicate on which of the several grounds under which it is possible to take proceedings under s. 211-A were the proceedings actually taken against the appellants in the instant case. If the suit was filed on any of the grounds contemplated under ss. 167 or 206 of the Abolition Act, i.e. on the ground of making a transfer by the defendants in contravention of the provisions of the Act or on the ground of putting the land to use not permitted by law, then the basis of the suit as already pointed out would be the ceasing of the plaintiffs the *sirdars* of the land as a result of their action. In such circumstances, if the plaintiffs are able to show that they have not transferred or perverted the land and were still *sirdars* of the land, the order of ejectment passed against them under s. 211-A would not be binding on them. Thus if the proceedings under s. 211-A were initiated in the instant case on the ground of transfer or perversion, it would be possible for the appellants to claim the relief of declaration under s. 229-D alleging that they were *sirdars* of the land still as they had not made any transfer or did any act of perversion. In such an event s. 331 would apply as a bar to the cognizance of the suit by the civil court.

If the proceedings under s. 211-A, however were taken against the appellants on the ground that they were *sirdars* having acquired such rights under s. 210(1), the position would be different because in that case they would still be the *sirdars* of the land, notwithstanding the order of ejectment against them in so far as on their own showing they had not actually been ejected on the date of the suit giving rise to this appeal. In that event there would be no occasion for them to seek a relief of

declaration that they are *sirdars* for the simple reason that, as indicated above, they continued to be *sirdars* till the date of the suit notwithstanding the order of ejectment passed against them under s. 211-A. In such circumstances what they are required to establish in the suit is not that they are *sirdars* as in the case of those to which the provisions of ss. 167 and 209, applied, but they have to establish that they are *sirdars* not liable to ejectment under s. 211, i.e. they have acquired their *sirdari* rights otherwise than under s. 210(i) of the Act, such a suit would not be covered by s. 229-B and as such s. 331 would not be a bar to its cognizance by the civil court.

In the circumstances discussed above we have to remand the case to the first appellate court to ascertain the ground on which the proceedings under s. 211-A were taken against the appellants and to dispose of the question of jurisdiction thereafter in the light of our observations made earlier.

This second appeal came to be referred to a Division Bench on the contention of the respondents that the decision in the case of *Dasaiwanu v. Kedar Nath* (1) required reconsideration. That case relates to proceedings under s. 212-A and not to proceedings under s. 211-A. As such it did not at all arise for consideration for the disposal of this appeal.

We accordingly remand the case to the Civil Judge, Hardoi, who shall first ascertain as to whether the order of ejectment passed against the plaintiffs-appellants under s. 211-A was passed on the ground covered by s. 167 or 206 or 211 of the Zamindari Abolition and Land Reforms Act, and then dispose of the question of jurisdiction in the light of the observations made in the

(1) 1968 A.L.J. 415.

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body of the judgment. He shall decide the appeal on the merits if he finds that the order of ejectment was based on a ground covered by s. 211. Parties shall bear their own costs in this appeal.

Order accordingly.

CIVIL MISCELLANEOUS

Before Mr. Justice Lakshmi Prasad and Mr. Justice
R. Chandra.*

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THE STATE TRANSPORT AUTHORITY,

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Motor Vehicle Act, 1939, s. 47 sub-ss. (1) and (3)—Sub-s. (3)—
“Matters”—meaning of—Decision by R. T. A. under sub-s.
(3) to increase the strength of a particular route—Discretion-
ary—Prior notice to existing operators not necessary.

The “matters” referred to in sub-s. (3) and required to be taken into consideration for determining the strength on any route, mean only what is stated in cls. (a) to (f) of sub-s. (1) and do not include “representation” required to be taken into consideration by the final clause of sub-s. (1) while disposing of an application for stage carriage permit and thus it is not incumbent on R. T. A., to afford an opportunity to the existing operators to make representations, if any, before taking a decision in regard to the strength on any route under sub-s. (3). Neither there is any provision in the Act or in the rules requiring a notice being given to an existing operator in regard to a proposal to increase the number of operators on a route nor the determination of such matter affects prejudicially an existing operator so as to entitle him to be heard before the proposed action is taken under sub-s. (3) of s. 47 of the Act.

S. 47(3) appears to confer discretion on the R. T. A. in the matter of determination of strength on a route and the same is to be exercised after taking into consideration various matters enumerated in cls. (a) to (f) of sub-s. (1).

Case-law discussed.

Writ Petition No. 226 of 1963 under Art. 226 of the Constitution.

D. N. Jha, for the Petitioner.

Standing Counsel for Opposite-Parties nos. 1 and 2.

The following judgment of the Court was delivered by:—

* White Sitting at Lucknow.

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L. PRASAD, J.:—This petition under Art. 226 of the Constitution has been referred to a Division Bench by our brother NIGAM by his order, dated 4th November, 1965 on the ground that it involves the decision of an important question of law on which there has been some difference of opinion between NIGAM, J. on the one hand and JAGDISH SAHAI, J. on the other, and as such, it is desirable to have an authoritative pronouncement by this Court.

By their resolution, dated 18th November, 1962 the Regional Transport Authority, Lucknow Region, opposite-party no. 2, took a decision to increase the strength of Lucknow-Hardoi route *via* Malihabad and Rahimabad, by twenty. This decision was taken without affording any opportunity to the operators already operating on that route to make any representation against the proposed increase in the strength on that route. Accordingly, some of the operators preferred revisions before the State Transport Authority, opposite-party no. 1 in December, 1962 under s. 64-A of the Motor Vehicles Act against the aforesaid decision of the Regional Transport Authority to increase the strength on the said route by twenty. Opposite-party no. 1 dismissed those revisions as non-maintainable by an order, dated 21st March, 1963. The petitioner is one of the existing operators who had gone in revision before the State Transport Authority and whose revision has been dismissed by the aforesaid order. It is in these circumstances that he prefers this petition under Art. 226 of the Constitution praying that the said order, dated 21st March, 1963 passed by opposite-party no. 1 be quashed by a writ of *certiorari* and further opposite-party no. 1 be directed to dispose of the revision on merits according to law.

The petition has been contested by the opposite-parties. We have heard the learned counsel for the parties.

The contention of Sri Jha appearing for the petitioner is that on reading sub-ss. (1) and (3) of s. 47 of the Motor Vehicles Act together it is obvious that the law enjoins on the Regional Transport Authority to take into consideration the representations made by the existing operators on a particular route before taking a decision for an increase in the existing strength on that route. Thus, his contention is that in order to comply with that requirement it is incumbent on the Regional Transport Authority whenever it proposes to increase the existing strength on any route to give notice to the persons already operating on that route to enable them to make representations, if any, against the proposed change in the existing strength of the route. Since admittedly, no notice in the instant case was given and the resolution, dated 17th November, 1962 came to be passed without affording any chance to the existing operators on Lucknow-Hardoi route, the argument is that the said resolution increasing the strength on the route by twenty is bad and deserves to be struck down. As regards the view expressed against the said contention in the case of *Brij Lal Misra v. The Regional Transport Authority* (1) by JAGDISH SAHAI, J. and affirmed in the case of *Laxmi Chand v. Regional Transport Authority* (2) by a Division Bench consisting of MOOTHAM, C. J. and RAGHUBAR DAYAL, J., the contention of the learned counsel is that the basis on which these two decisions proceed must be taken to be non-existent in view of the Supreme Court decision in the case of *Abdul Mateen v. Ram Kailash Pandey* (3) and hence those decisions of this Court may not be treated as laying down good law.

S. 47(1) provides:—

“A Regional Transport Authority shall, in considering an application for a stage carriage permit, have regard to the following matters, namely:—

(a) the interests of the public generally;

(1) A.I.R. 1958 All. 390.

(2) A.I.R. 1959 All. 782.

(3) A.I.R. 1963 S.C. 61.

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(b) the advantages to the public of the service to be provided, including the saving of time likely to be effected thereby and any convenience arising from journeys not being broken;

(c) the adequacy of other passenger transport services operating or likely to operate in the near future, whether by road or other means, between the places to be served;

(d) the benefit to any particular locality or localities likely to be afforded by the service;

(e) the operation by the applicant of other transport services, including those in respect of which applications from him for permits are pending;

(f) the condition of the roads included in the proposed route or area;

and shall also take into consideration any representations made by persons already providing passenger transport facilities by any means along or near the proposed route or area, or by any association representing persons interested in the provision of road transport facilities recognised in this behalf by the State Government, or by any local authority or police authority within whose jurisdiction any part of the proposed route or area lies."

Then we have sub-s. (3) to say:—

"A Regional Transport Authority may, having regard to the matters mentioned in sub-s. (1), limit the number of stage carriages generally or of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region."

It is thus obvious that the power to fix strength on any particular route is conferred on the Regional Transport Authority by sub-s. (3) reproduced above. It no doubt provides that in determining the strength of any route a Regional Transport Authority is to have regard to the "matters mentioned in sub-s. (1)". Thus, the question arises as to what are the matters mentioned in sub-s. (1) which according to sub-s. (3) have to be taken into consideration by a Regional Transport Authority while determining the strength of any route. As shall appear from sub-s. (1) reproduced above, it purports to lay down considerations to be taken into account while disposing of applications for stage carriage permits. Its opening sentence says that "A Regional Transport Authority shall . . . have regard to the following matters, namely": and then it goes on to enumerate those matters in various clauses designated as (a) to (f). Thereafter sub-s. (1) goes on to say that a Regional Transport Authority shall also take into consideration any representations, etc. On a plain reading of sub-s. (1) we find ourselves in agreement with the view expressed by our brother JAGDISH SAHAI and affirmed in a subsequent case decided by a Division Bench of this Court, that the matters required to be considered by sub-s. (1) for disposing of an application for stage carriage permit are only those which are enumerated in cls. (a) to (f), and do not include representations, etc. referred to in the final clause beginning with the words "and shall also take into consideration any representation. . . .". It is true that there is a semi-colon at the end of each of cls. (a) to (f), and there is no conjunction in between cls. (e) and (f) and further, there is a conjunction in between the cl. (f) and the final clause, and as such, looking at the provisions superficially it may be possible to think that what is said in the final clause below cl. (f) is also included in the expression "following matters, namely" occurring in the

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opening clause of sub-s. (1). But a close scrutiny of the entire provision leaves no doubt that it is not possible to put such an interpretation for the simple reason that care is taken to use the words "shall also take into consideration" in the last clause beginning with the conjunction "and". The use of the words "shall also take into consideration" in the last clause has the effect of disjoining what follows those words from cls. (a) to (f) which follow the expression "the following matters, namely." Once it is clear that only what is stated in cls. (a) to (f) of sub-s. (1) stands included in the expression "the following matters, namely" occurring in the opening clause of sub-s. (1), there remains no difficulty in concluding that the "matters" referred to in sub-s. (3) and required to be taken into consideration for determining the strength on any route, mean only what is stated in cls. (a) to (f) of sub-s. (1) and do not include "representations" required to be taken into consideration by sub-s. (1) while disposing of an application for stage carriage permit. We are thus unable to accept the contention of the learned counsel that the requirement of sub-s. (3) is to take into consideration representations by persons already providing passenger transport facilities, and hence, it is incumbent on the Regional Transport Authority to afford an opportunity to such persons to make representations, if any, before taking a decision in regard to the strength on any route under sub-s. (3).

The contention of the learned counsel, however, is that the right of the existing operators to make representations in this behalf has been recognised even in the above mentioned two cases of this Court with the modification that they have a right to make such representations not at the stage action is being taken under sub-s. (3), but at the stage the application for stage carriage permits are taken up for consideration on merits.

and since, in view of the Supreme Court decision referred to above, it is not possible to entertain such representations, at the stage of consideration of applications on merit, it must be held that they have got to be entertained before a decision is taken in regard to the strength under sub-s. (3). The material observations in the Supreme Court case occur on page 67 of the report. These are in the following words:—

“We cannot accept the contention on behalf of the appellant that when the Regional Transport Authority following the procedure provided in s. 57, comes to grant or refuse a permit it can ignore the limit fixed under s. 47(3), because it is also the authority making the order under s. 48. S. 47(3) is concerned with the general order limiting stage carriages generally, etc., on a consideration of matters specified in s. 47(1). That general order can be modified by the Regional Transport Authority, if it is so decides, one way or the other. But the modification of that order is not a matter for consideration when the Regional Transport Authority is dealing with the actual grant of permits under s. 48 read with s. 57, for at that stage what the Regional Transport Authority has to do is to choose between various applicants who may have made applications to it under s. 46 read with s. 57. That, in our opinion, is not the stage where the general order passed under s. 47(3) can be reconsidered. . . .”

There is thus no doubt that in view of the above-mentioned observations of the Supreme Court, the view expressed in the two Allahabad cases, that existing operators can make representations against the determination of the strength under sub-s. (3) at the stage the applications for stage carriage permits are taken into consideration on merit, cannot be taken to be laying

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down good law. Still, we are unable to see as to how a person placed in the position of the petitioner can claim as a matter of right to be heard by a Regional Transport Authority whenever it decides to undertake re-determination of the strength on a route under sub-s. (3). Obviously, if no such right has been conferred on him by the statute, he can have none unless it be possible to say that by such determination any of his rights is affected. It may be that if a larger number of operators is put on the route with the result that the profits so far earned by the existing operators become divisible among a larger number of persons and, as such, an increase in the strength of the route may, in ultimate analysis, mean some diminution in the income of existing operators. But that fact by itself does not furnish the existing operators with any cause of action in so far as by getting permits they get no monopoly and, as such, whatever be the ultimate effect of an increase in the strength of the route it does not entitle them to claim notice. It thus follows that neither there is any provision in the Act or in the rules requiring a notice being given to an existing operator in regard to a proposal to increase the number of operators on a route nor the determination of such matter affects prejudicially an existing operator so as to entitle him to be heard before the proposed action is taken. In that view of the matter we are unable to countenance the contention of the learned counsel that an existing operator must have his say in the matter of determination of the strength on a route under sub-s. (3) of s. 47 before a final decision is taken thereunder. [S. 47(3) appears to confer discretion on the Regional Transport Authority in the matter of determination of strength on a route and the same is to be exercised after taking into consideration various matters enumerated in cls. (a) to (f) sub-s. (1)]. It is nobody's case that in passing the im-

pugned resolution opposite-party no. 2 failed to take into consideration any of the matters enumerated in cls. (a) to (f) of sub-s. (1). Hence, the inevitable conclusion is that there is nothing bad about the impugned resolution so as to call for any interference with it.

The only other contention raised before us on behalf of the petitioner is that an order passed under s. 47(3), whether it be taken to be a quasi-judicial or administrative order, is revisable under s. 64-A of the Motor Vehicles Act, and as such, the view taken by opposite-party no. 1 that the petitioner's revision is not maintainable deserves to be quashed. There was a controversy between the parties if an order under s. 47(3) would be a quasi-judicial order or an administrative order. The contention of the learned counsel for the petitioner was that it would be a quasi-judicial order, whereas that of the Senior Standing Counsel was that it would be a purely administrative order. As already mentioned, learned counsel for the petitioner maintained that whatever view be taken in regard to the nature of an order under s. 47(3), there could be no two opinion that it was a revisable order under s. 64-A of the Act. And, on that score learned counsel for the petitioner maintained that the petitioner was entitled to a relief with the direction to opposite-party no. 1 to dispose of the petitioner's revision on merit according to law. In view of our decision that the order passed by opposite-party no. 2 under s. 47(3) to revise which the petitioner had filed a revision under s. 64-A, was a good order and did not call for any interference, we consider it necessary to decide the abovementioned controversy, namely if an order under s. 47(3) is a quasi-judicial order or a purely administrative order, and whether or not a revision against such an order is maintainable under s. 64-A, because even if it be accepted that a revision against such an order is competent under s. 64-A, it would pro-

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vide no ground for interference with the impugned order of opposite-party no. 1 by this Court in exercise of its writs jurisdiction. In other words, if the order sought to be revised is found to be a good order not requiring any interference, then the dismissal of a revision preferred from it, whether on merit or on the ground of non-maintainability, would provide no occasion for the issue of a writ. In that view of the matter, we without deciding the other point raised by the learned counsel, hold that the petition fails.

The petition is dismissed with costs.

Petition dismissed.

CIVIL MISCELLANEOUS

Before Mr. Justice Broome and Mr. Justice
Satish Chandra

BRITISH INDIA CORPORATION LTD.

... PETITIONER,

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November 22,

v.

THE STATE OF U. P. AND OTHERS ... RESPONDENTS.

U. P. Industrial Disputes Act, 1947 (as amended by U. P. Act I of 1957), ss. 6-H(1) and (2)—*Respective scope of sub-ss. (1) and (2)—No predetermined amount—Contested questions involved—Case would fall under sub-s. (2)—State Government or its delegate have no jurisdiction to issue certificate when amount not determined by Labour Court.*

In the context of sub-s. (1) the phrase 'money due' postulates liquidated or special sum. The State Government can only satisfy itself as to the arithmetical correctness of the claim. But if there is a dispute as to the calculation of the amount, as distinct from its arithmetical verification, the matter is outside the ambit of sub-s. (1). Disputed cases fall under sub-s. (2) and the Labour Court has to determine the amount at which the benefit should be computed.

Thus, if the claim is to money under the three mentioned cases and the only genuine dispute relates to its arithmetical verification, it can be dealt with under sub-s. (1). All other cases fall under sub-s. (2) which only the Labour Court is competent to determine.

Civil Miscellaneous Writ No. 2726 of 1961 connected with Civil Miscellaneous Writ No. 181 of 1960.

G. D. Srivastava and C. S. P. Singh, for the Petitioner

N. C. Upadhyaya and D. P. Singh and S. C., for the
Opposite-Parties.

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The following judgment of the Court was delivered by—

S. CHANDRA, J.:—This and the connected writ petition have been referred to a larger Bench by S. K. VERMA, J. because he found himself in disagreement with the view expressed by R. S. PATHAK, J. in the *U. P. Electric Supply Company Ltd., Allahabad v. R. N. Sharma* (1) as to the interpretation of s. 6-H of the U. P. Industrial Disputes Act, 1947.

The relevant facts in Civil Misc. Writ No. 2726 of 1961 are as follows:—

The British India Corporation Private Limited the petitioner was a manufacturing concern. It was also the Managing agent of several companies including the Balrampur Sugar Company. With effect from 30th June, 1958 the petitioner ceased to be the managing agents of the Balrampur Sugar Company. The petitioner company, as the managing agent of Balrampur Sugar Company, had under written agreements engaged respondents 4 to 12, and these respondents were working in the Balrampur Sugar Company. By letters issued on 5th March, 1958 the petitioner informed respondents 4 to 12 that since the managing agency has been terminated they were being retrenched from service with effect from 30th June, 1958. The respondents were assured that Messrs. Balrampur Sugar Company would retain their services and that they would leave the petitioner's services formally on 30th June, 1958. These respondents approached the petitioner company for absorption in their other units. Some of them also claimed retrenchment compensation. The petitioner company expressed its inability to absorb them or to grant any compensation. Thereupon these nine persons made an application to the State Government under s. 6-H(1) of the U. P. Industrial Disputes Act, 1947 for payment of

(1) (1965) 10 F.L.R. 298.

retrenchment compensation. In respect of the applications of six of them the Regional Conciliation Officer, Gorakhpur was asked to verify the claim. In respect of the other three the Assistant Labour Commissioner, Allahabad took up the matter. These officials issued notices of the claim to the company in January 1960. The company filed an objection, dated 18th February, 1960. It was alleged that the respondents were in continued employment of the Balrampur Sugar Company without any alterations in their conditions of service. By virtue of the operation of s. 6-O of the U. P. Industrial Disputes Act the respondents were not retrenched and were as such not entitled to any compensation. It was also stated that some of the respondents were not workmen as defined by the U. P. Industrial Disputes Act. It was pleaded that as there was no pre-determined sum of money payable, the case did not fall under s. 6-H of the Industrial Disputes Act. It was prayed that the respondents' application should not be entertained and rejected.

The Regional Conciliation Officer, Gorakhpur submitted a detailed report, dated April 4, 1960 to the Regional Assistant Labour Commissioner, Allahabad. In this report he repelled the various contentions raised by the company and observed that though there was no fixed determined amount and the same had to be calculated, yet since the details of the employment, etc. were admitted and only a question of mere arithmetical calculation and not of any determination of the amount was involved, the amounts so calculated could be recovered as arrears of land revenue. He also mentioned the amount due to the various respondents as retrenchment compensation.

The Assistant Labour Commissioner referred the petitioner company's objections in respect of the other three workmen also to the Regional Conciliation Officer, Gorakhpur for verification and for a parawise comment.

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The Regional Conciliation Officer, Gorakhpur submitted another report, dated 18th June, 1960 with a para-wise comment of the company's objections. Thereafter the Assistant Labour Commissioner issued notices, dated 30th November, 1960 to the company to have its say in the matter. 7th December, 1960 was fixed for final verification of the dues claimed. On 7th December, 1960 the petitioner company filed another objection which was similar in terms to its earlier objection. The Assistant Labour Commissioner, Allahabad then issued a recovery certificate on 17-5-1961 for a sum of Rs.28,031-34. Two of the respondents alleged that the amount had not been correctly ascertained. The matter was again verified and ultimately a revised certificate for Rs.32,643-43 was issued on 30th of August, 1961. On 6-9-1961 the Tehsildar, Kanpur issued a notice to the petitioner for payment of the said amount. Thereupon the petitioner came to this Court praying that the aforesaid certificate be quashed. It is urged that the respondents were not workmen as defined by the Industrial Disputes Act as their duties were of a managerial nature and involved the case of tact, initiative and independence, that there has been no termination of the respondents' employment and that s. 6-O of the Act is applicable and as such no retrenchment compensation was payable at all. It has also been stressed that there was no pre-determined amount and the Assistant Labour Commissioner acting under s. 6-H(1) of the Act had no jurisdiction to ascertain it. It is urged that in view of the various disputed questions raised, the case was not covered by sub-s. (1) of s. 6-H but fell within the purview of sub-s. (2) of that section, and the State Government or its delegate had no jurisdiction to issue a certificate without the amount being determined by the Labour Court under sub-s. (2).

In dealing with the principal contention that the

State Government or its delegate had no jurisdiction to entertain the application under s. 6-H(1) of the Act, it is necessary to read s. 6-H:

"6-H. *Recovery of money due from an employer*—(1) Where any money is due to a workman from an employer under the provisions of ss. 6-J to 6-R or under a settlement or award, or under an award given by an adjudicator or the State Industrial Tribunal appointed or constituted under this Act, before the commencement of the Uttar Pradesh Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, the workman may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the money due to him, and if the State Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same as if it were an arrear of land revenue.

(2) Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such Labour Court as may be specified in this behalf by the State Government and the amount so determined may be recovered as provided for in sub-s. (1).

(3) For the purposes of computing the money value of a benefit, the Labour Court may, if it so thinks fit, appoint a Commissioner in the prescribed manner who shall, after taking such evidence as may be necessary, submit a report to the Labour Court and the Labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case."

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This section was introduced in the U. P. Industrial Disputes Act, 1947 by the U. P. Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, U. P. Act I of 1957. It was enacted to make available to individual workman a speedy alternative remedy to enforce or execute their existing rights under the Act. A summary procedure was prescribed so that the workmen are not compelled to take resort to the ordinary course of execution in the civil court.

A simple mode of recovery is prescribed by sub-s. (1). If the State Government is satisfied that any money is due, it issues a certificate therefor and the money is recovered by the Collector as an arrear of land revenue. This can be done directly under sub-s. (1) in three classes of cases, namely, where money is due under a settlement or an award of under ss. 6-J to 6-R, which provide for compensation for retrenchment or lay off. Claims of other kinds and categories are dealt with by sub-s. (2). For such claim, the workman has to approach the specified Labour Court and get the amount determined by it. The amount so determined is then recoverable in the mode prescribed in sub-s. (1).

The direct operation of sub-s. (1) is expressly limited to the three mentioned classes of claim. But sub-s. (2) has no such words of limitation and applies also to those three classes of claim. In that sense, it overlaps and is wider than sub-s. (1). But sub-s. (2) deals with claims to "any benefit which is capable of being computed in terms of money". The antithesis is between the "money due" under sub-s. (1) and "any benefit which is capable of being computed in terms of money" under sub-s. (2).

In *Punjab National Bank Ltd. v. K. L. Kharbanda* (1) the Supreme Court interpreted the term 'any benefit

(1) A.I.R. 1963 S. C. 487.

which is computable in terms of money' to include both monetary as well as non-monetary benefits. A claim to monetary benefit is in a sense a claim to money. From this point of view claims to money due under the three categories mentioned in sub-s. (1) will also fall under sub-s. (2). So interpreted, sub-s. (2) will supplant sub-s. (1) and the latter will have no play. But that cannot be; because under sub-s. (1) the State Government and under sub-s. (2) the Labour Court deals with the cases. The question is, what and where is the defining line between the two provisions.

The nature of the enquiry provided by the two provisions gives a clue to the nature of the claims intended to be dealt with by them. Under sub-s. (1) the State Government has to satisfy itself that the money claimed is due. In the context, the phrase 'money is due' postulates some liquidated or specified sum. The State Government has only to verify it. The State Government can hold an enquiry in order to satisfy itself as to the arithmetical correctness of the claim. But if there is a dispute as to the calculation of the amount, as distinct from its arithmetical verification, the matter is outside the ambit of the "satisfaction" of the State Government.

Such disputes fall under sub-s. (2). Under sub-s. (2) the Labour Court has to determine the amount at which the benefit should be computed. So, disputes as to computation are within the jurisdiction of the Labour Court. The Labour Court has to hold an elaborate enquiry. Under sub-s. (3) the Labour Court is authorised to appoint a commissioner to make a report after recording evidence. The Labour Court has to "consider" the report as also the other circumstances of the case, before computing and determining the amount. In the *Punjab National Bank's* case (1) WANCHOO, J. held:—

(1) A.I.R. 1963 S.C. 487 para 8.

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"Further, if we compare sub-s. (1) with sub-s (2) of this section, it will appear that sub-s. (1) applies to cases where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chap. VA and that contemplates that the amount is already computed or calculated or at any rate there can be no dispute about the computation or calculation; while sub-s. (2) applies to cases where though the monetary benefit has been conferred on a workman under an award, it has not been calculated or computed in the award itself, and there is dispute as to its calculation or computation."

Similarly, a Division Bench of this Court in the *Regional Conciliation Officer v. Messrs. Kays Construction Co. (Pvt.) Ltd.* (1) observed that the case requires only simple arithmetic in order to work out the actual sum payable to each workman and that no determination of any questions of rights or any benefits arose." It held (p. 278):

"We have no hesitation in saying, in agreement with the views expressed by most courts in India, that where it was necessary in order to know the sum due or the money payable to a workman to enter into questions calling for 'determination' apart from mathematical calculations then such determination had to be done under the U. P. Act under s. 6-H(2), and that in such cases the first sub-section of s. 6-H would not apply."

This case was taken up to the Supreme Court on appeal and the decision was affirmed: See *Kays Construction Co. v. State of U. P.* (2). It held that the word "benefit" does not cover cases of mere arithmetical calculation and that objections as to the arithmetical calculation of the amount due can be investigated by the State Government under sub-s. (1).

(1) I.L.R. 1962 (2) All. 264.

(2) A.I.R. 1965 S.C. 1488.

It is thus plain that computation denotes some thing other than mere arithmetical calculation. Questions as to the principles applicable in deducing the extent or the nature of the claim, or, relating to the interpretation of the settlement or the award or the relevant provisions relating to retrenchment or lay off; would be germane to the computation of the amount.

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If the right of the workman to receive the money is disputed, the dispute can be determined by the Labour Court under sub-s. (2). This was specifically held by the Supreme Court in *Central Bank of India Ltd. v. P. S. Raiagobalan* (1) GAJENDRAGADKAR, C. J. speaking for the Supreme Court observed (para. 16):

"In our opinion, on a fair and reasonable construction of sub-s. (2) it is clear that if a workman's right to receive the benefit is disputed, that may have to be determined by the Labour Court. Before proceeding to compute the benefit in terms of money, the Labour Court inevitably has to deal with the question as to whether the workman has a right to receive that benefit."

His Lordship observed that an enquiry into the existence of the right must be held incidental to the main determination which has been assigned to the Labour Court by sub-s. (2). His Lordship observed:

"Incidentally, it may be relevant to add that it would be somewhat odd that under sub-s. (3), the Labour Court should have been authorised to delegate the work of computing the money value of the benefit to the Commissioner if the determination of the said question was the only task assigned to the Labour Court under sub-s. (2). On the other hand, sub-s. (3) becomes intelligible

(1) A.I.R. 1964 S.C. 749.

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Here also the claim was to a specific amount due under an award. There was no dispute as to the arithmetical verification of the amount. But it was treated to be a benefit involving computations.

The position seems to be that if the claim is to money under the three mentioned cases, and the only genuine dispute is as to its arithmetical verification, it can be dealt with by the State Government under sub-s. (1). All other cases fall under sub-s. (2) and only the Labour Court is competent to determine the amount.

For the respondents, reliance was placed upon a learned Single Judge's decision of this Court in *U. P. Electric Supply Co. Alld. v. R. N. Sharma* (1). In that case it was held that the distinction between sub-s. (1) and sub-s. (2) does not turn on the question whether the claim is open to dispute or not. We are unable to agree with this view-point.

In the present case, the petitioner employer's objection was that the respondents were not workmen and as such had no right to receive the amount claimed, and further that there really was no retrenchment and also because of the operation of s. 6-O of the U. P. Industrial Disputes Act, they were not entitled to any retrenchment compensation. These objections do not relate to the arithmetical verification of any money due but, rather to the computation of the claimed benefit, the right to which had to be determined. There is no suggestion on behalf of the respondents that this objection is either frivolous or has been raised merely for the purpose of ousting the jurisdiction of the Labour Commissioner under sub-s. (1). Under the circumstances, the State Government or its delegate had no jurisdiction to deal with the matter under sub-s. (1). The matter had to be dealt with by the Labour Court under sub-s. (2)

(1) (1965) 10 Factory Law Reports, 298.

and the amount determined by it could alone be recovered in the mode prescribed by sub-s. (1).

In the result, the petition succeeds. The impugned certificate granted by the Assistant Labour Commissioner is quashed. It would be open to the respondents to take appropriate proceedings under s. 6-H (2) of the Act. The parties shall bear their own costs.

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Ordered accordingly.

APPELLATE CIVIL

Before Mr. Justice B. Dayal and Mr. Justice S. D. Khare

1966

November 26,

MAHENDRA SINGH

... APPELLANT,

v.

ATTAR SINGH AND OTHERS

... RESPONDENTS.

U. P. Zamindari Abolition and Land Reforms Act (I of) 1951, s. 152—Right of a Bhumidhar to transfer his interest—Principles of Hindu Law governing co-parcenary property—Applicability—Whether Bhumidhari rights owned by a Hindu family, if joint Hindu property.

Bhumidhari rights are special rights created by the Act and these new rights are to be governed by the provisions of that Act. The notions of Hindu Law or Mohammedan Law cannot be imported into the rights created by this special law. The principles of co-parcenary property are not applicable to Bhumidhari rights. S. 152 of the Act clearly gives a right to a Bhumidhar to transfer his interest in the Bhumidhari properties. The question of legal necessity is not relevant in such a case.

Second Appeal No. 2104 of 1964 connected with Second Appeal No. 2105 of 1964 against the judgment and decree of P. S. VERMA, Civil and Sessions Judge, Bulandshahr, in Civil Appeal No. 150 of 1963 decided on 18th May, 1964.

Swami Dayal, for the Appellant.

B. L. Yadav, for the Respondents.

The following Judgment of the Court was delivered by—

B. DAYAL, J.:—These are two connected appeals both arising out of two suits filed by Attar Singh against Mahendra Singh and Jeet Singh referred to this bench by a learned single Judge. Both the suits nos. 145 of 1954 and 333 of 1954 were heard together. The former suit no. 145 of 1954 was treated as the main suit. The allegation of the plaintiff was that the sale deed executed

by his adoptive father Jeet Singh in favour of Mahendra Singh was without legal necessity, without consideration and was in respect of the joint family property in which he was also interested as the adopted son and the sale deed was, therefore, invalid. There were proceedings under s. 145 Cr. P. C. and the agricultural plots and their crop had been attached in criminal proceedings. The second suit was, therefore, filed for a declaration that the attached property, namely, the crop belonged to the plaintiff and was liable to be released in favour of the plaintiff. The defence taken to both these suits was that Jeet Singh had a right to sell the property, that there was legal necessity and there was valid consideration for the sale. It was also denied that the plaintiff was an adopted son of Jeet Singh. The trial court after hearing both the suits, came to the conclusion that the sale deed was for legal necessity and consequently the house, the *gher* and half of the agricultural *bhumidhari* land which belonged to Jeet Singh were validly transferred by the sale deed. But the court held that half of the *bhumidhari* property could not be sold by Jeet Singh as it was the share of the plaintiff Attar Singh, and Jeet Singh had no right to sell it. The court also found that possession of the agricultural plots had been handed over to Mahendra Singh, the transferee even before the sale was executed and consequently the crop grown upon these plots belonged to the transferee and the plaintiff had no right to it. On these findings, the trial court decreed suit no. 145 of 1954 only to the extent of the half of the *bhumidhari* property and dismissed the rest of the plaintiff's claim in that suit, and dismissed suit no. 333 of 1954. Against that decision, the plaintiff filed two appeals, appeal no. 165 of 1963 against the decision in suit no. 145 of 1954 refusing to set aside the sale in respect of the house, the *gher* and half of the *bhumidhari* property and appeal no. 150 of 1963 against the dismissal of his suit no. 333 of 1954. The defendants filed appeal no. 180 of 1963 against that part of the

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decision in suit no. 145 of 1954 by which the sale deed was set aside to the extent of half of the *bhumidhari* property. The learned Civil Judge heard all the three appeals together and framed three points for its decision. The first was whether Attar Singh was the adopted son of Jeet Singh and on this he came to the conclusion that he was the adopted son. This was the concurrent finding by both the courts below and has not been challenged before us in Second Appeal. Nothing more need be said about that matter now.

The second point considered by the lower appellate court was whether Attar Singh could get the wholesale deed executed by Jeet Singh in favour of Mahendra Singh set aside. On this point, the lower appellate court found that there was no legal necessity for the sale and that the *bhumidhari* property also was the joint family property and in the absence of legal necessity no part of it could be transferred by Jeet Singh. He, therefore, set aside the whole of the sale deed. The third point considered by the lower appellate court was whether the plots in suit were given in the possession of Mahendra Singh, the transferee so that the crop in dispute for Rabi 1361F was sown by him. On this point the Court found that possession had not been transferred to the transferee and the crop was, therefore, not sown by him. On this ground suit no. 333 of 1954 was also decreed. Against that decision of the lower appellate court, two appeals have been filed by Mahendra Singh, the transferee in the two suits.

After hearing learned counsel for both the sides, we have come to the conclusion as said above that the question of adoption cannot be challenged in Second Appeal because there is no question of law raised and it must be accepted that Attar Singh plaintiff was the adopted son of Jeet Singh transferor. The finding of the lower appellate court that the sale deed was without any legal

necessity must also be accepted. The lower appellate court found that out of the consideration mentioned in the sale deed, a sum of Rs.3,200 which was paid before the Sub-Registrar, had certainly passed as consideration at the time of the sale deed. It did not accept the other part of the consideration having been paid and this part of the judgment also cannot be challenged in Second Appeal. The result of this finding is that there being no legal necessity for the sale, the property which was the joint family property at the time of the sale could not be validly transferred. The house property and the *gher* were therefore validly held to be not transferable by the lower appellate court. The question then arises whether the lower appellate court was right in holding that the *bhumidhari* rights were also joint family property and could not be transferred without proof of legal necessity. The lower appellate court has observed as follows in order to hold that the *bhumidhari* property was also the joint family property:

“In this case admittedly the plots were in the tenancy of Jeet Singh. If he had simply made an adoption and did nothing else beyond that, probably it could be held that tenancy remained with Jeet Singh with no interest of Attar Singh in the same, but the circumstances of the case show that Jeet Singh treated the property as joint family property. These plots were in the tenancy of Prem Mahavidyadaya Zamindar and after the adoption in 1944.....an application was moved by Jeet Singh to have the name of Attar Singh recorded over the plots. By an agreement between the zamindar and the parties, the name of Attar Singh was recorded, vide copy of compromise dated 31-8-1948 Ex. V and the order, dated 3-9-1948 Ex. VI.’

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Upon this fact, the lower appellate court has considered that because the plaintiff Attar Singh was made a co-tenant with Jeet Singh in the tenancy plots and therefore, when the *bhumidhari* rights were acquired subsequently by depositing ten times the annual rental and on passing of the U. P. Zamindari Abolition and Land Reforms Act, these *bhumidhari* rights, so acquired must be held to be joint family property. In the first place these facts alone are insufficient to lead to that conclusion. Moreover, we are of the opinion that the *bhumidhari* rights are special rights created by Act I of 1951 and these new rights are solely to be governed by the provisions of the Act. The notions of Hindu Law or Mohammadan Law which would be applicable to other property not governed by any special law cannot be imported into the rights created by this Act.

By s. 152 of the U. P. Zamindari Abolition and Land Reforms Act, rights of a *bhumidhar* are transferable and this power of transfer is only subject to the provisions of this Act. The section is as follows:

"152. The interest of a *bhumidhar* shall be transferable subject to the conditions hereinafter contained in this chapter."

Thus the rights of a *bhumidhar* can be transferred and no restrictions are imposed upon those rights to transfer beyond those mentioned in the chapter of the Act. If the property is treated to be joint family property governed by the notions of Hindu Law, then a *bhumidhar* will not be able to transfer his interest unless he proves legal necessity and will not be able to make a gift of his property. This would curtail the right given by s. 152. Moreover, under s. 161 of the Act, a *bhumidhar* can make an exchange of his *bhumidhari* rights with other rights. Under s. 169 of the Act, a *bhumidhar* can make a will of his holding or any part thereof except as provided by sub-s. (2), which curtails the right to make a

will only in the case of a *bhumidhar* who has got those rights by inheritance as a widow, widow of a male lineal descendant in the male line of descent, mother, daughter, father's mother, son's daughter, sister, or half-sister being the daughter of the same father as the deceased. Thus except these female heirs mentioned in sub-s. (2) every other *bhumidhar* has a right to bequeath his interest by will. Ss. 171 to 173 then lay down a special mode of succession which is wholly inconsistent with the rights of a co-parcener in the property. S. 175 provides for the right by survivorship only in respect of co-widows and co-tenure-holders, who die without any heir under the Act. It is, therefore, clear that under the Act the principles of co-parcenary property are not applicable to *bhumidhari* rights. This view is supported by the observations of this Court in *Ramji Dixit v. Bhrigunath* (1). The question in that case was whether a female *bhumidhar* who either acquired rights by inheriting tenancy rights before the passing of the Act and then became a *bhumidhar* or inherited the *bhumidhari* property after the passing of the Act, could make a transfer of the property which would enure to the benefit of the transferee even after the death of transferor and it was held that the notions of Hindu Law or Mohammadan Law should not be imported into the interpretation of the Act as it is equally applicable to persons governed by any personal law. If a Mohammedan or a Christian's widow could absolutely transfer the property inherited by her, there was no reason to hold that a Hindu widow could not do so. On the same principles, since s. 152 of the U. P. Zamin-dari Abolition and Land Reforms Act clearly gives a right to a *bhumidhar* to transfer his interest, there is no reason to hold that in this case Jeet Singh could not transfer his interest in the *bhumidhari* property in favour of Mahendra Singh by means of a sale deed, unrestricted by any consideration of legal necessity etc.

(1) 1964 A.L.J. 197 (F. B.).

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In the result, we partly allow appeal no. 2105 of 1964 arising out of suit no. 145 of 1954 and hold that the sale deed executed by Jeet Singh in favour of Mahendra Singh is valid only to the extent of half share in the *bhumidhari* property held by Jeet Singh, and dismiss appeal no. 2104 of 1964 in view of the findings of the lower appellate court that Mahendra Singh had no possession over the plots of land and he could not have sown the crops which were attached by the criminal court and is, therefore, not entitled to those crops. Parties will bear their own costs in these appeals.

Ordered accordingly.

CIVIL REVISION

Before Mr. Justice S. Chandra

GAMMON INDIA LTD.

... APPELLANT-

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v.

HAKAM SINGH ... RESPONDENT-OPPOSITE-PARTY.

Code of Civil Procedure, 1908, s. 115—Finding of fact as to the place where cause of action arose—If can be scrutinised in revision—Clause in a contract fixing the place where to be deemed to have been entered for the purpose of jurisdiction—If binding—Evidence to prove that actually entered at another place—If permissible.

The question whether any part of the cause of action arose at a particular place is a jurisdictional fact and is open to scrutiny in a revision.

Where a clause in a contract laid down by mutual agreement that the contract would be deemed to have been entered at Bombay and the court at Bombay would have jurisdiction, it would be binding and a party to it cannot be allowed to lead evidence in derogation of this agreement to prove that it was actually entered upon at another place.

Ch. Jyadish Prasad v. Ganga Prasad Chaudhary (1) and Deep Chand Jain v. Board of Revenue, U. P. (2) relied on.

Civil Revision No. 721 of 1964 against the judgment and order of Yashodhan Pal Singh, 3rd Addl. Civil Judge, Varanasi, in Original Suit No. 45 of 1963 decided on 10th February, 1964.

(1) 1959 Supp. I S.C.R. 723.

(2) 1966 A. L. J., 113.

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C. S. P. Singh and B. K. Agarwal, for the Appellant-Applicant.

Ambika Pd. and Rajendar Kumar, for the Respondent-Opposite-Party.

S. CHANDRA, J.:—This revision is directed against the decision of an issue relating to the jurisdiction of the courts of Varanasi to entertain an application under s. 20 of the Indian Arbitration Act for referring the dispute to arbitration in accordance with the arbitration clause in the contract entered into by the parties.

In defence, cl. 13 of the contract was relied upon to sustain the plea that courts at Bombay alone had jurisdiction. Cl. 13 reads thus:

“Notwithstanding the place where the work under this contract is to be executed it is mutually understood and agreed by and between the parties hereto that this contract shall be deemed to have been entered into by the parties concerned in the city of Bombay and the court of law in the city of Bombay alone shall have jurisdiction to adjudicate thereon.”

The learned Civil Judge held that on the evidence adduced by the parties the contract was actually entered into at Varanasi. He held that the phrase in cl. 13, that, this contract shall be deemed to have been entered into by the parties concerned in the city of Bombay, has no meaning unless the contract is actually entered into in the city of Bombay. He observed that there was no evidence to establish that it was really entered into at Bombay. He concluded that the entire cause of action

arose at Varanasi and the courts at Bombay have no jurisdiction. In this situation the parties could not, by an agreement, confer jurisdiction on courts at Bombay. He, therefore, held that courts at Varanasi had jurisdiction to take cognizance of the application. Aggrieved the defendant has come to this Court in revision.

The question that arises is whether any part of the cause of action arose at Bombay so that in view of cl. 13 of the agreement the courts at Varanasi had no jurisdiction to entertain the application for reference of the dispute to arbitration. Munshi *Ambika Prasad*, appearing for the opposite party, has raised a preliminary objection. He has urged that the aforesaid question is concluded by findings of fact based on the assessment of evidence on the record, and, in a revision this Court is not entitled to reassess the evidence and record its own finding. I am unable to accept this submission. The vital point, as I shall show a little later, is whether the court below was, by law, empowered to permit evidence to be adduced on this question. If it was not entitled to do so, the court has clearly exercised its jurisdiction illegally and with material irregularity. This, apart, the question whether any part of the cause of action arose at Bombay is a jurisdictional fact, the decision of which will determine the jurisdiction of the court to entertain the application. The finding on such a fact is amenable to scrutiny in a revision, see *Ch. Jagdish Prasad v. Ganga Prasad Chaudhary* (1) and *Deep Chand Jain v. Board of Revenue, U. P. Alld.* (2). The preliminary objection cannot, therefore, be sustained.

Coming to the merits, it is settled that where two courts have jurisdiction to try a matter under the ordinary law, an agreement that disputes will be tried by one court only is valid, and does not contravene s. 28 of the Contract Act. It is equally that if courts at one place do not have jurisdiction under the ordinary law,

(1) 1959 Supp. I, S. C. R. 733. (2) 1966 A.L.J. 113.

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a provision in a contract that such a court alone shall have jurisdiction is void, because jurisdiction cannot be conferred by the consent of parties. The question, therefore, is whether the courts at Bombay had jurisdiction. under s. 20 of the Code of Civil Procedure, a suit can be instituted in a court, *inter alia*, within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. In a suit based on breach of contract, a part of the cause of action arises at place where the contract is entered into. In the absence of any allegation or proof that cl. 13 of the agreement was not entered into voluntarily, it should be binding between the parties, provided it is otherwise valid in law. The first part of cl. 13 that the parties agree that the contract shall be deemed to have been entered into at Bombay, is an agreed statement of fact. It has not been shown to be in contravention of any provision of law or otherwise invalid in law.

The Lahore High Court had occasion to deal with such a term in a contract. In *Abnash Chandar v. Auto Supply Co. Ltd. Lahore* (1), cl. 15 of the agreement provided:

"The civil courts in Lahore alone will have jurisdiction to try cases relating to disputes arising under the agreement because the agreement has been made at Lahore and the motor lorry has been delivered to the hirer at Lahore and all payments under the agreement have to be made in Lahore."

The High Court observed that there is a clear distinction between two classes of cases i.e. (1) where in spite of the fact that under the ordinary provisions of law a particular court would have jurisdiction, the parties provided that another court, to the exclusion of the former court, shall have jurisdiction to adjudicate up-

(1) A.I.R. 1930 Lah. 611.

on the disputes arising under the agreement, and (2) cases in which the agreement specified the place where the terms of the contract had to be carried out, in other words where according to the facts stated in the agreement the cause of action was to be deemed to arise. It then held, that the first kind of agreements had been held illegal, but the second description of the agreements could not be held to be illegal.

The first part of cl. 13 which says that it is mutually understood and agreed by the parties that this contract shall be deemed to have been entered into in the city of Bombay is valid and binding. Evidently, this clause was put in to avoid any dispute on the question as to where the contract was entered into, and, to eliminate the necessity of proving it. In the absence of any plea which might enable the plaintiff to avoid the binding effect of this clause of the contract, the plaintiff should not have been permitted to lead evidence in derogation of his agreement. Such evidence was inadmissible under s. 91 Indian Evidence Act. The court below should have given effect to this part of the contract and disallowed the plaintiff from attempting to establish that the contract was actually executed at Varanasi. In my opinion, this part of cl. 13 was binding between the parties and the defendant was entitled to a finding that the contract was entered into at Bombay.

On this finding, the courts at Bombay would have jurisdiction, under the general law. The second part of cl. 13 was, therefore, applicable and equally binding between the parties. The parties having agreed that the courts at Bombay alone shall have jurisdiction to adjudicate on the contract, the application could not be entertained by courts at Varanasi.

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In the result, the revision succeeds. The impugned finding on issue no. 1 is set aside. It is held that the courts at Varanasi had no jurisdiction to take cognisance of the application. The issue is answered in the affirmative. The application will be returned for presentation to the proper court. The applicant will have his costs on the revision.

Revision allowed.

APPELLATE CRIMINAL

Before Mr. Justice R. N. Sharma and Mr. Justice
U. S. Srivastava*

THE STATE OF U. P.

... APPELLANT,

v.

NEEL KANTH AND ANOTHER

... RESPONDENT.

Indian Evidence Act, 1872, s. 9—*Identification parade—Purpose and necessity of—Offence ss. 399 and 402, I. P. C., proved against the accused arrested on the spot—Failure to put up the accused for identification—Effect.*

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The purpose of identification test is to test the memory and veracity of a witness who claims to identify an accused person as the participant or one of the participants in a crime. Such identification test may be needed in a case of dacoity, assembling of persons for the purpose of committing dacoity, riot and any other offence the participants in which were not known to the witnesses from before and could not be apprehended at the spot. If, an alleged culprit has been arrested at the spot, his capability will depend on the veracity of witnesses who would say that he had committed the offence. It is not necessary to put up such arrested persons for identification at an identification parade. There may be cases in which the accused himself may claim identification test in order to support his plea of non-participation in the crime. In such a case, the court may consider the request of the accused on its merits and may in a suitable case require the prosecution to hold an identification parade.

Where accused were arrested on the spot and the prosecution fully proved that they were in the gang which had assembled at the time and place as alleged by the prosecution with the intention of committing dacoity after having made preparation for the same.

Held, that failure to put up the accused for identification test does not cause any infirmity in the prosecution case.

Balwant v. The State (1) does not lay down the correct law.

Criminal Appeal no. 88 of 1965 against the order dated the 10th November, 1964, passed by S. P. MISHRA, Assistant Sessions Judge, Hardoi.

*While sitting at Lucknow.
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K. N. Kapoor, for the State.

D. K. Trivedi, for the Respondents.

The following Judgment of the Court was delivered by—

SHARMA, J.:—This is an appeal by the State of Uttar Pradesh against the judgment of the learned Assistant Sessions Judge, Hardoi, acquitting the respondents, Neel Kanth and Drigpal of the charges under ss. 399 and 402, I.P.C.

Briefly stated the prosecution story was as follows:

Rajendra Prasad Singh, Station Officer of Police Station Atrauli, was going in connection with the investigation of a murder case and when he reached near village Gadenra he received information that the gang of Munnu Lal would assemble at Behta Bridge in the night for committing dacoity at the house of Rameshwar Dayal of village Mahmoodpur. Rajendra Prasad Singh went to Police Station Sandila and communicated this information to Raghubir Singh, Station Officer of that place. An entry of this information was made in the general diary. The station officer of Sandila sent two constables to village Mahmoodpur for keeping guard at the house of Rameshwar Dayal and he himself along with Rajendra Prasad Singh and other police personnel proceeded towards Behta Bridge. The police party collected some non-official witnesses also and went to a grove near Behta Bridge. Necessary instructions were given to all the officials and non-official members of the party and four groups were formed, one of which was under the leadership of Rajendra Prasad Singh. At about midnight, being the night between the 12th and the 13th of October, 1963, the dacoits began coming. They sat on the Behta Bridge and began to talk among themselves. They were armed with fire-arms and lathis etc. and were 15 or 16 in

number. From their talk it became evident that the gang which had assembled, was of dacoits and they had made preparation for committing dacoity at the house of Rameshwar Dayal. Rajendra Prasad Singh fired his very light pistol and according to the instruction previously given all the four groups rushed towards the dacoits. A shot was fired by the dacoits but it did not hit anyone in the police party. In retaliation Raghubir Singh fired his gun. The leader of the gang, Munnu Lal was hit and died at the spot. The present respondents, Neel Kanth and Drigpal were arrested at the spot, while Maiku ran away but he was identified by the raiding party. On search of the persons of Drigpal and Neel Kanth, a country-made pistol and five live cartridges were recovered from the possession of Neel Kanth. This man did not hold any licence for the country-made pistol. A kanta and a torch were recovered from the possession of Drigpal. Recovery memos of the articles recovered were prepared at the spot and the two arrested persons were taken to the police station, Sandila along with the recovered articles. A first information report of the occurrence was lodged by Rajendra Prasad Singh at Police Station, Sandila.

A case was registered on the basis of the aforesaid first information report and the Second Officer of police station, Sandila, namely, Mukhtar Ali was directed to investigate the case. An inquest was held on the dead body of Munnu Lal and it was sent for post-mortem examination. The investigating officer proceeded with the usual investigation. Maiku was arrested and put up for identification. Ultimately these three persons were sent up for trial. There was the additional charge under s. 251 (a) of the Arms Act against Neel Kanth.

The accused persons denied having assembled at the Behta Bridge as alleged by the prosecution and they further alleged that they were not arrested from that place.

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They attributed their false implication to enmity. According to Neel Kanth he was implicated at the instance of Qamruddin of village Ajagawan because he was on inimical terms with him. Drigpal stated that he was implicated on account of enmity with the police. According to Neel Kanth he was arrested from his own house and according to Drigpal he was arrested from his shop at Sandila.

P.W. 2 Rajendra Prasad Singh, Sub-Inspector, P.W. 6 Neel Kanth, Head Constable, P.W. 7 Raghubir Singh, Sub-Inspector, P.W. 9 Baij Nath, Constable and P.W. 11 Irshad Ali and P.W. 12 Munshi Raza, non-officials, were examined for the prosecution to prove the participation of the respondents in the assembly of the gang with the object of committing dacoity. The learned Assistant Sessions Judge repelled all the arguments of the defence and relying on the testimony of the aforesaid prosecution witnesses he found it fully proved that the gang of Munnu Lal assembled at Behta Bridge in the night between the 12th and the 13th of October, 1963, as alleged by the prosecution and that the respondents were among the culprits who had gathered there with the intention of committing dacoity after having made preparation for the same. However, relying on a single Judge decision of this Court in *Balwant v. State* (1) it was contended before the learned Assistant Sessions Judge that because the respondents were not put up for identification test and their identity as participants in the assembly of dacoits was not established, there was a fatal weakness in the prosecution case. The learned Assistant Session Judge accepted this argument and held that the respondents were entitled to acquittal on the strength of the aforesaid decision of this Court. He thus acquitted Neel Kanth and Drigpal respondents of the charges under ss. 399 and 402, Indian Penal Code. Maiku was also given

(1) 1965 A.W.R. 519.

benefit of doubt because the evidence of identification against him was not found acceptable. The case under s. 25, 1(a) of the Arms Act was, however, found established against Neel Kanth and he was convicted and sentenced on that charge. There is no appeal of Neel Kanth before us against that conviction. The State has filed appeal against the acquittal of Neel Kanth and Drigpal alone on the charges under ss. 399 and 402, Indian Penal Code.

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Sri D. K. Trivedi, *amicus curiae*, has argued the case on behalf of Drigpal. None appeared on behalf of Neel Kanth but on our suggestion Sri Trivedi argued the case on behalf of Neel Kanth as well.

The finding of the learned Assistant Sessions Judge on the question of fact is in favour of the prosecution but the *amicus curiae* has challenged that finding and has tried to show that the evidence adduced does not establish the prosecution case as regards participation of the respondents in the alleged assembly of dacoits. Before we enter into this question of fact, we will like to deal with the question of law which appears to be of considerable importance. The learned Assistant Sessions Judge appears to have found himself helpless in view of the single Judge decision of this Court—*Balwant v. State* (1) referred to above even though he found it fully proved that the respondents were in the gang of Munnu Lal which had assembled at the time and place alleged by the prosecution with the intention of committing dacoity at the house of Rameshwar Dayal after having made preparation for the same. The learned Assistant Government Advocate, Sri K. N. Kapur, informs us that many other cases of this nature are being acquitted on the authority of the aforesaid decision and thus this matter requires serious consideration by a Bench. We have therefore heard arguments of learned counsel for both sides

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at great length. In the case of *Balwant v. State* (1) the accused were charged under ss. 399 and 402, Indian Penal Code. They and their companions were alleged to have collected for the purpose of committing dacoity. The accused persons had been in jail since the date when they were arrested and no identification proceedings were held in jail. KATJU, J. observed that thus the prosecution witnesses had not identified any of the accused as the persons who were arrested by the police in the evening of the date when they were said to have assembled for committing dacoity. He therefore held that the absence of identification of the accused was a fatal weakness in the prosecution case and hence it could not be held that the accused were the persons who had collected at the place for the purpose of committing dacoity.

With respect we are unable to agree with this view of our Brother, KATJU, J. The purpose of identification test is to test the memory and veracity of a witness who claims to identify an accused persons as the participant or one of the participants in a crime. Such identification test may be needed in a case of dacoity, assembling of persons for the purpose of committing dacoity, riot and any other offence the participants in which were not known to the witnesses from before and could not be apprehended at the spot. It may be quite easy for a witness to identify an accused in the dock and say that he was the person who had committed or had participated in the commission of the crime. Therefore for the purpose of testing the memory and veracity of the witnesses, identification parades are held in jail and the witnesses are asked to pick out the culprits from the group of persons in which suspects as well as other persons are mixed. If, on the other hand, an alleged culprit has been arrested at the spot, his culpability will depend on the veracity of witnesses who would say that he had committed the offence. It is not necessary to put up such arrested per-

(1) 1965 A.W.R. 519.

son for identification at an identification parade. There may be cases in which the accused himself may claim identification test in order to support his plea of non-participation in the crime. In such a case, the court may consider the request of the accused on its merits and may in a suitable case require the prosecution to hold an identification parade. If, however, no request is made by the accused or where a request has been made by the accused but is considered by the court to be devoid of merit, it will not be necessary to hold an identification test and the failure of the prosecution to put up the accused for identification test will not be deemed to be fatal weakness in the prosecution case.

As was held in *Lajja Ram v. State* (1) an accused has no right to claim identification but if the prosecution turns down his request for identification it runs the risk of the veracity of the eye-witnesses being challenged on the ground. The prosecution will be exposing the claim of such witnesses to the criticism that the test of identification was shirked because the witnesses would not have been able to stand that test. It has to be noted that in the instant case no request for identification was made by the respondents.

In *Kanta Prashad v. Delhi Administration* (1) the Supreme Court held that the failure to hold an identification parade does not make inadmissible the evidence of identification in court and the weight to be attached to such identification is a matter for the court of fact. In the aforesaid Supreme Court case no test identification parade was held. The appellants were known to the police officials who had deposed against them and the only persons who did not know them before were the persons who gave evidence of association to which the High Court did not attach much importance. It was

(1) A.I.R. 1955 All. 671.

(2) A.I.R. 1958 S.C. 350.

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observed by their Lordships of the Supreme Court that it would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in court. Thus it is not essential that an identification parade should be held even with respect to witnesses who did not know the accused before the occurrence and they can be asked to identify the accused in the court itself at the time of the trial. However, it will need consideration as to what weight should be attached to such identification in court.

Again, in *Vaikuntam Chandrappa v. State of Andhra Pradesh* (1) the Supreme Court held that the substantive evidence of a witness is his statement in court but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding.

In none of these cases the accused persons appear to have been arrested at the spot. The question of holding an identification parade for them could arise only when they were not arrested at the spot and the memory of the witnesses who claimed to have seen them at the time of the commission of the crime, had to be tested in an identification parade.

In *Emperor v. Sadasibo* (2) the identification of property was sought to be discredited on the ground that test identifications were not held. In this connection the following observations of ROWLAND, J. may be read with interest:

"Personally I see no magic about test identifications. The evidence on which the Court has to act

(1) A.I.R. 1960 S.C. 1340.

(2) A.I.R. 1939 Pat. 35.

is the identification by the witnesses at the trial and the question is, are the witnesses to be believed or not?"

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In *State of Orissa v. Dhanmati* (1) also the question of identification of stolen property arose. It was held—

"If there is evidence of identification establishing beyond doubt that the articles were stolen properties from the house of the complainant, the Magistrate is not justified in rejecting that evidence merely on the ground that the articles recovered did not agree with those given in the F. I. R. or that they were not put to proper test identification parade. . . .

Though it is prudent to hold test identification parade in such cases, the failure to do so does not make the evidence inadmissible."

In *Awadh Singh v. The State* (2) it was observed that the non-holding of a test identification parade may not be a ground to vitiate the trial although it may be a very important feature in considering the credibility of the witnesses on the point of identification.

On behalf of the respondents reliance was placed on a case of this Court *Birey Singh v. State* (3) in which it was held that in the absence of identification proceedings the mere 'ipse dixit' of the witnesses that the accused was one of the dacoits could not be believed. In this case too the accused was not arrested at the spot. He was arrested subsequently but was not put up in an identification parade and the witnesses were asked to state at the trial whether he was one of the dacoits. On facts, *Birey Singh's* case (3) is distinguishable from the instant case

In an unreported decision of this Court (Lucknow Bench) *Mohd. Hussain v. State* (4), MULLA, J. took a view contrary to that taken by KATJU, J. in

(1) 1964 Cr. L. J. 602.

(2) 1953 Cr. L. J. 181.

(3) A.I.R. 1954 Pat. 483.

(4) CrL. A. No. 362/56 decided on 2nd Sept. 1958.

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Balwant's case (1) aforementioned. The accused before MULLA, J. was also charged under s. 399, I.P.C. While dealing with the question of identification, MULLA, J. observed:

"In a case where suspects are arrested on the spot, the question of identification does not arise. The police would, therefore, not collect the witnesses for the purpose of getting the arrested persons identified. The trial court was right in its observations against the conduct of the Magistrate who granted the request of the appellants that an identification parade be held. In those cases where persons are arrested on the spot the question of identification does not arise. An identification is held to test the memory and observation of a witness. The prosecution case depended upon the allegation that the appellants were arrested at the Co-operative brick-kiln. If that fact was proved, it was immaterial whether any witness succeeded in identifying the appellants or not. On the other hand if this fact became doubtful, then even a large number of identifications would not have been enough to prove the guilt of the appellants. An identification should be held only where a two way inference can be drawn from the results.

* * * * *

In this case if the witnesses had picked out the suspects, that would not have strengthened the prosecution case at all. The prosecution case depended upon the arrest on the spot and the contemporaneous entry relating to that arrest in the police papers. The Magistrate was, therefore, ill-advised when he directed that an identification parade should be held in this case."

Having considered all the authorities cited before us we are of the view that the case of *Balwant v. State* (1) does not lay down the correct law. Where in a case like the present one the accused is arrested at the spot, all that has to be proved is that he was in fact arrested at the place and in the circumstances alleged by the prosecution and the failure of the investigating agency to put him up for test identification is not at all a weakness in the prosecution case, much less a fatal weakness. As stated above, the respondents in the case before us did not claim test identification and no question of holding a test identification parade at all arose in the present case and the case of the prosecution could not be rightly thrown out on the ground of absence of test identification parade.

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There is ample, evidence in this case to prove that the respondents were in fact arrested at Behta Bridge in the night in question while they had joined an assembly of miscreants who had collected with the intention of committing dacoity after having made preparation for the same. P.W. 2 Rajendra Prasad Singh, Station Officer of police station Atrauli, stated that one of the dacoits was arrested by the first group and on being interrogated he told his name as Drigpal and that Drigpal was the same person who was standing in the dock. The witness further stated that Head Constable Neel Kanth arrested another person who gave out his name as Neel Kanth and that this Neel Kanth was also the same person who was an accused present in the dock. P.W. 6 Head Constable Neel Kanth stated that his group made out of the police party challenged the miscreants and caught hold of Neel Kanth, the accused in the dock. The witness, Neel Kanth further stated that besides Neel Kanth accused Drigpal accused was also arrested at the spot. P.W. 7 Raghubir Singh, the then Station Officer of Police Station Sandila, stated that Neel

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Kanth and Drigpal accused standing in the dock were arrested at the spot. P.W. 9 Constable Baij Nath stated that two dacoits i.e. Neel Kanth and Drigpal who were present in court, had been arrested at the spot. P.W. 11 Irshad Ali, a non-official witness, stated that Drigpal accused present in the dock was arrested by the Sub-Inspector and his person was searched. It was suggested to this witness in cross-examination that he was not present at the spot. In this connection he stated that when Neel Kanth was arrested, he saw him in the light and that it is wrong to say that the witness was not present at the spot. Another non-official witness, P.W. 12 Munshi Raza stated that Neel Kanth and Drigpal were arrested at the spot. Further on, the witness said that writing work relating to Neel Kanth and Drigpal accused persons was done at the spot. By "accused persons" he meant the accused persons in the dock. The respondents who were present in the dock at the time of their trial were thus duly identified as the two persons arrested at the spot and the fact that they were not put up at an identification parade is of no consequence.

As we have stated above, the learned Assistant Sessions Judge found the testimony of the six eye-witnesses examined on behalf of the prosecution believable and relying on their testimony he found it proved that the respondents had assembled near the Behta Bridge in the night and in the manner alleged by the prosecution. In the view of the learned Assistant Sessions Judge the public witnesses were independent and there was no reason to disbelieve them. The learned counsel for both sides have taken us through the entire evidence adduced for the prosecution and we are of the view that the finding of the learned Assistant Sessions Judge was fully justified and correct. Of the six eye-witnesses four were police officials. One of them was station officer of police station Sandila and the other of police station, Atrauli. The

two other police officials were a constable and a Head Constable respectively of police station Sandila. The witnesses have narrated the entire prosecution case and they stated that when the would be dacoits had arrived and assembled at a place near Behta Bridge and had discussed the whole plan for committing dacoity at the house of Rameshwar Dayal a very light pistol was fired by P.W. 2 Rajendra Prasad Singh, station officer, police station, Atrauli. The four groups that were formed out of the police party rushed at the assembly of the miscreants. Thereupon one of the dacoits fired at Raghubir Singh who in retaliation fired at the dacoits. Munnu Lal died as a result of the shot fired by Raghubir Singh and the two respondents were arrested while the remaining miscreants managed to escape. Learned counsel for the defence has pointed out certain discrepancies in the evidence and has contended that the whole prosecution story is inherently improbable and unacceptable. We do not agree with this contention of the learned counsel and do not find anything inherently improbable. Rajendra Prasad Singh, S. O., Atrauli, was going on some work and on the way he got information that certain miscreants would assemble at Behta Bridge in that night for committing a dacoity. Because the place was within the jurisdiction of police station Sandila, it was but natural for Rajendra Prasad Singh to inform Raghubir Singh, S. O., Sandila. He went there, informed the station officer and this fact was recorded in the general diary at police station Sandila. The two Sub-Inspectors then organized a raid and they took some official and non-official witnesses with them. The witnesses have further stated that when they would be dacoits collected near the Behta Bridge, they discussed the plans which indicated that they intended to commit dacoity at the house of Rameshwar Dayal. When convinced of the evil intention of the persons who had collected, one of the Sub-Inspectors gave the

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signal by firing his very light pistol and the four groups which had been made out of the police party rushed at the dacoits.

There are no doubt some discrepancies in the statements of the prosecution witnesses but they are not material and the entire prosecution case cannot be discarded by reason of such discrepancies. When several witnesses relate the same story, some contradictions are bound to happen. The contradictions in the evidence are on the point whether anybody had touched or had not touched the contents of the jhola which was found lying near the dead dacoit, whether the station officer of Sandila had gone to the police outpost and had taken the Head Constable and the Constable from there with him or whether these persons met him at the police station, whether the statement of Raghubir Singh was recorded by the investigating officer at the spot or at the police station and similar other matters. These are all matters relating to the details and we do not think that any witness stated a deliberate lie on any of these points. The contradictions could be due to weak or faded memory.

The learned counsel has relied on certain circumstances which according to him make the prosecution story improbable. He has drawn our attention to the fact that no person in the police party received any injury although one of the alleged dacoits was shot dead. From this circumstance the learned counsel tries to make out that there was no incident as alleged by the police and because somehow a man had lost his life at the hands of the police the latter made out the story in order to escape from the liability of killing a man. In this connection, the learned counsel has also laid stress on the circumstances that even though blood is said to have been found near the dead body of Munnū Lal it was not sent to the Chemical Examiner and Serologist for report whether it was human blood. The police would have done well in

sending the blood for report of the Chemical Examiner and Serologist but perhaps it was not considered necessary because the case was not being investigated as one of murder and the question as to how Munnu Lal lost his life was not in dispute. Merely because blood recovered from the place were not sent for chemical examination it cannot be said that Munnu Lal did not die at the spot at all. The absence of injury on any person in the police party is also of no material importance. The dacoits who had assembled near the Behta Bridge were taken by surprise when they were surrounded by four groups of the police party from four sides. A shot from the very light pistol was fired and in the light so created the dacoits must have seen that they were surrounded by an armed police party and the first and the foremost consideration of the dacoits must have been to run and escape. They would have seen no point in giving fight to the police party. One of them, however, fired a shot but it missed and when a Sub-Inspector fired in retaliation, Munnu Lal fell down and died. It is not strange if in the circumstances none in the police party received injury.

Another circumstance pointed out is that Rameshwar Dayal was a necessary witness but has not been examined by the prosecution. We do not think that it was necessary to examine Rameshwar Dayal. According to the information received by the Sub-Inspector the dacoits were to assemble near Behta Bridge for the purpose of committing dacoity at Rameshwar Dayal's place. Necessary prosecution was taken by the police by sending two constables to Rameshwar Dayal's place. Rameshwar Dayal did not come to the place of occurrence and he could not state what happened there. All that he could say was that two constables were sent to his place to keep guard. It may even be that Rameshwar Dayal did not know that the constables had come to guard his house

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for a particular reason or he might not have noticed the presence of the constables at night. Therefore Rameshwar Dayal could not make any useful contribution to the prosecution case and the failure of the prosecution to examine him is not material.

Lastly, it has been contended by the learned counsel that even though the occurrence took place in the night between the 12th and the 13th of October, 1963, the property alleged to have been seized by the police in the occurrence was sent to the Sadar Malkhana from the police station on the 11th of November, 1963. No explanation of this delay has been given by the prosecution. The suggestion is that there was no recovery in fact and these materials were procured subsequently in order to lend support to the case that was being made out by the police. The fact relevant to the case was the recovery of a country-made pistol and some live cartridges from the possession of Neel Kanth. At this stage there can be no doubt regarding the recovery of these things from Neel Kanth's possession. He was tried on the charge under s. 25 1(a) of the Arms Act and has been convicted. No appeal has been filed against this conviction. We find no good reason to disbelieve the prosecution case in this regard.

On close consideration of all the evidence and the circumstances we find the prosecution case established beyond doubt and we hold that the respondents collected along with several other persons at the Behta Bridge in the mid-night of the 12th and the 13th of October, 1963 with the intention of committing dacoity after having made preparation for the same. We have already held that the failure to put up the respondents for identification test does not cause any infirmity in the prosecution case. Thus the acquittal of the respondents was not justified.

We allow the appeal and set aside the order of acquittal of the respondents, Neel Kanth and Drigpal. We convict them both under ss. 399 and 402 of the Indian Penal Code and sentence them each to undergo rigorous imprisonment for five years on each of these two charges. Both sentences shall run concurrently. The sentence of Neel Kanth on the charge under s. 25 1(a) of the Arms Act shall also run concurrently with the other sentences imposed on him if not already undergone by him. If the respondents are on bail, they shall surrender forthwith and serve out the sentence. The Additional District Magistrate (Judicial), Hardoi shall be directed to get them arrested and sent to jail. A copy of this order shall be sent to him for necessary action.

Appeal Allowed.

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Before Mr. Justice Jagdish Sahai and Mr. Justice Broome.

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GIRDHARI LAL ... RESPONDENT.

U. P. (Control) of Rent and Eviction Act, III of 1947, s. 7(2)—
*Landlord obtaining decree for ejectment and executing it—
Another found in possession having an allotment order—Vali-
dity of allotment order—Premises split up with the consent of
the landlord—Allotment of one split portion—Legality—Allot-
tee seeking permission...Consent of landlord—Necessity of.*

Where the landlord had obtained a decree for ejectment of the tenants and had put in execution whereunder warrants of possession had been issued it could be assumed that the accommodation had fallen vacant or was about to fall vacant and allotment thereafter would be valid and if the allottee had taken possession it would be regular. Consent of the landlord for taking over possession by virtue of allotment order is not necessary.

Where a premises is split up in two with the agreement of the landlord and two allotment orders have been passed, it would not be illegal.

Second Appeal no. 2350 of 1963 from the judgment and decree of R. A. RAHMANI, District Judge, Dehra Dun, in Civil Appeal no. 475 of 1962 decided on 15th March, 1963.

B. M. Srivastava, for the Appellant.

S. N. Sahai, G. D. Srivastava, for the Respondent.

The following Judgment of the Court was delivered by—

BROOME, J.:—This second appeal arises out of a suit filed by the plaintiff-appellant on 16th March, 1960 under O. XXI, r. 103, C. P. C. for the ejectment of the defendant-respondent Girdhari Lal from a certain shop in Paltan Bazar in the town of Dehra Dun. The suit was dismissed by the Additional Civil Judge of Dehra Dun on 24th September, 1962 and the appeal filed by the

plaintiff was likewise dismissed by the District Judge of Saharanpur on 15th March, 1963.

The facts leading up to the suit are as follows: The plaintiff-appellant, Mahant Surjanand Giri, is the Manager of the Maha Nirvani Panchaiti Akhara of Allahabad, which owns certain immovable properties in Dehra Dun, including two shops in Paltan Bazar, which were previously let out to Niranjan Singh and Jiwan Singh. These tenants fell into arrears with their rent and the plaintiff consequently sued for their ejectment and secured a decree against them from the Munsif of Dehra Dun on 30th March, 1957. The decree was put into execution, but when the plaintiff went to take possession of the shops, he found that a certain Fakir Singh was in possession of one of the shops, in respect of which he had obtained an allotment order in August, 1956. Possession of the second shop was delivered to the plaintiff on 15th November, 1957, and that shop was subsequently occupied by the Gandhi Ashram under an allotment order on 6th December, 1957. The plaintiff made attempts to secure possession of the shop occupied by Fakir Singh by making an application under O. XXI, r. 97, C.P.C.; and on 21st July, 1958 the Munsif allowed this application, holding that the allotment order issued in Fakir Singh's favour on 3rd August, 1956 was without jurisdiction, since no vacancy was in existence or about to come into existence at that time. But when the plaintiff went to take possession from Fakir Singh, he found Girdhari Lal (the present respondent) occupying the shop. On being apprised of this the Munsif at first ordered Girdhari Lal to be evicted, the same as Fakir Singh; but Girdhari Lal filed an objection, claiming that he had taken possession in pursuance of an allotment order granted on 25th July, 1958 and the result was that the Munsif on 19th September, 1959 dismissed the execution application against him. Thereafter the plaintiff-appellant

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filed the suit out of which this present second appeal arises on 16th March, 1960, challenging the legality of the allotment order passed in favour of Girdhari Lal and praying for his ejectment from the disputed shop.

The courts below have held that there is no illegality in the allotment order requiring the plaintiff-appellant to let the disputed premises to Girdhari Lal, and that Girdhari Lal is in the position of a "statutory tenant" and is not liable to ejectment.

Mr. S. N. Kacker, who has appeared on behalf of the appellant, has made the following three submissions:

1. That the allotment order issued in favour of Girdhari Lal is bad because the premises allotted had not fallen vacant.

2. That the allotment order is bad because it has been passed in respect of a portion of an accommodation, not the whole accommodation.

3. That even assuming that the allotment order was not illegal, the defendant had no right to take actual possession of the premises without the consent of the plaintiff-landlord.

We find absolutely "no force in the first contention advanced" on behalf of the appellant. When a decree for ejectment had been passed against the previous tenants Niranjan Singh and Jiwan Singh on 30th March, 1957 and execution proceedings had been initiated by the decree-holder in pursuance of that decree, the Rent Control Officer was fully justified in assuming that the accommodation in question had fallen vacant, or at any rate was about to fall vacant. Warrants for delivery of possession were issued on 15th November, 1957 against the judgment-debtors Nirajan Singh and Jiwan Singh and 21st July, 1958 against Fakir Singh, who had taken possession of the premises in collusion

with the judgment-debtors; and it is clear that both the judgment-debtors and Fakir Singh had ceased to occupy the premises by the time the allotment order was issued in favour of Girdhari Lal on 25th July, 1958. We are satisfied in the circumstances that the premises had actually fallen vacant by that time, and that the allotment order in favour of Girdhari Lal cannot be challenged on the ground that there was no vacancy.

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In support of his second argument (regarding the splitting up of the accommodation) Mr. *Kacker* relies on the Full Bench decision in *N. C. Agarwal v. Krishna Lal Mehra* (1) in which it has been held that a District Magistrate, acting under s. 7(2) of the Control of Rent and Eviction Act, is bound to treat the entire accommodation comprised in the tenancy as a single unit and cannot direct the landlord to let a portion of the accommodation to one person and the remaining portion to another person. In the present case the previous tenants Niranjan Singh and Jiwan Singh appear to have jointly held a tenancy in two adjacent shops; and one of these shops was allotted to the Gandhi Ashram by the allotment order dated 6th December, 1957, while the second has been allotted to Girdhari Lal on 25th July, 1958. At first sight, therefore, it would seem that the Rent Control Officer has split up the accommodation into two portions and allotted them separately, which would be illegal, in view of the dictum given by the Full Bench in the aforementioned case. The finding given by the courts below, however, is that the plaintiff agreed to the letting out of the one shop to the Gandhi Ashram and thus has himself disrupted the single unit of accommodation and split it into two. It is obvious that when the landlord himself agrees to or acquiesces in the splitting of an accommodation, the Rent Control Officer is fully entitled to pass separate allotment orders in respect of the por-

(1) 1960 A.L.J. 755.

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tions so formed, treating each of them a separate accommodation; and in such circumstances the ruling relied upon will not be applicable. Mr. *Kacker* contends that the allotment order in favour of the Gandhi Ashram covered both the shops, but possession could be taken of only one, as the other was occupied by Fakir Singh; and faced with this situation, it is argued, the landlord had perforce to accept the **Gandhi Ashram** as his tenant in one shop only for the time being. This argument might have had some force if the plaintiff had sought to get possession of the remaining shop with the object of handing it over to the Gandhi Ashram; but it is clear from the material on record that in actual fact he has been trying to get the possession delivered to himself with the idea of keeping this second shop in his own occupation. The plaintiff allowed the Gandhi Ashram to occupy the one shop and agreed to accept rent from the Gandhi Ashram for that one shop alone, without making any kind of stipulation regarding the second shop; and we find ourselves in full agreement with the courts below in holding that by adopting such a course he was himself responsible for splitting what had previously been a single accommodation into two. He obviously cannot be permitted now to turn round and claim that the two shops form one single unit and cannot be allotted separately.

We are now left with the third argument viz. that the defendant-respondent had no right to take possession of the disputed shop without the landlord's consent, even if he had an allotment order in his favour. Mr. *Kacker* points out that an 'allotment order' under s. 7(2) is nothing but a direction to the landlord to let the accommodation to a certain person; and he argues that until the landlord agrees to comply with this direction, the "allottee" has no status and no rights in the premises allotted. In support of this contention reliance is placed on certain observations made in various reported decisions of

this Court. In the first of these cases *Lachmi Narain v. R. C. E. O., Lucknow* (1) the passage relied on runs as follows:

"Shanker Dutt had never approached the appellant and the appellant had never let out the shop to him. Shanker Dutt could not, therefore, claim any right of occupancy on the basis of the allotment order. The allotment order was simply an order calling upon the appellant to let out the accommodation to him and so long as it was not let out to him he acquired no rights whatsoever."

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But that case dealt with an entirely different situation and can afford no guidance for the decision of the present appeal. There the allottee had been living in the disputed premises for about three years before the allotment order was issued in his favour and there could be no question of his taking possession on the strength of the allotment orders he merely continued to remain in possession after that order, the same as before. The present case is clearly distinguishable.

The second ruling to which our attention has been drawn *Krishna Chandra Sharma v. State of U. P.* (2) contains the following remarks:

"All what the District Magistrate could direct was that the landlord shall let out the accommodation to a particular person or not to let out an accommodation to him. If what was intended was that the accommodation be let out to Chhail Behari. Chhail Behari would still have to approach the landlord and obtain a lease of the premises from him. Chhail Behari would not be entitled to occupy the house merely by virtue of being an allottee of the accommodation."

(1) 1962 A.L.J. 213.

(2) 1962 A.L.J. 426.

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But in that case too the facts were peculiar, for it was found that no proper order had been passed in accordance with the terms of s. 7(2), requiring the landlord to let the accommodation to Chhail Behari. The remarks as to what the legal rights of Chhail Behari would have been, if a valid order under s. 7(2) had been passed, are thus hypothetical and obiter.

In the third case relied on by Mr. Kacker, *Udhoo Dass v. Prem Prakash* (1), it was observed by DESAI, J.:

"The State Government had no justification to call the order an 'allotment order'; it is an order directing a landlord to let out an accommodation to a particular person. It confers no right whatsoever upon the person other than of requiring the landlord to let out the accommodation to him."

These remarks, however, besides being obiter, are to be found in the judgment of only one of the Judges comprising the Bench, and consequently cannot be construed as expressing the opinion of the Court or as having any binding force.

The fourth case cited by Mr. Kacker is *Smt. Malika Bai v. R. C. E. O., Allahabad* (2), in which we find the following passage:

"The order on the basis of which the opposite party took possession of the accommodation was an order neither addressed to her nor authorising her to take possession of the accommodation; it was an order addressed to the appellant requiring her only to give the accommodation to her. The only right that the respondent acquired under it was to a lease of the accommodation from the appellant and her duty was to approach her and enter into a contract of tenancy with her. Unless she entered into a contract of tenancy with her she had no right to take possession of the accommodation."

(1) 1963 A.L.J. 406.

(2) 1964 A.L.J. 1089.

In that case too, however, the remarks relied on are purely obiter, for the judgment goes on to state: "But we are not concerned in this appeal with this act of the respondent, however unlawful it may be, done subsequently to the impugned order."

We find nothing, therefore, in any of the cases cited by Mr. *Kacker* that can be treated as a binding authority for the proposition put forward by him, viz. that if the allottee of premises in respect of which an allotment order has been passed under s. 7(2) of the Control of Rent and Eviction Act takes possession of the premises in pursuance of that order without first obtaining the consent of the landlord, his possession is unlawful. In our opinion, if such an allottee, acting in good faith, finds the accommodation in question lying vacant and proceeds to take possession of it, he cannot be said to be acting illegally and possession taken in this manner cannot be deemed to be unlawful. Fraud or *mala fides* may vitiate his claim to retain possession; but assuming that he has throughout acted in good faith, we see no reason to hold that the allottee would not be justified in taking possession of the accommodation which the landlord has been commanded to let out to him. It is true that the order under s. 7(2) does not expressly authorise the prospective tenant to take possession, but it is implicit in such an order that he is entitled to do so, provided the accommodation is lying vacant and is not already in the occupation of the landlord or any one else. The order directs the landlord to let the accommodation to the allottee; and thereupon, unless the landlord can persuade the Rent Control Officer (or the State Government) to withdraw the order by showing it to be illegal or otherwise unjust or inexpedient, he is obliged to allow the allottee to take possession of the accommodation (presuming it is vacant) and is entitled to realise rent from him. In some cases the landlord may at first refuse to submit to

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the order and may make representations to the Rent Control Officer or approach the State Government under s. 7-F, but when he has exhausted his remedies, he will have no option but to comply with the directions given to him by the competent authority. Until those remedies are exhausted, of course, no one can force him to accept rent from the allottee or to recognise the allottee as his tenant; but if in the meantime, the allottee has taken possession of the premises without obtaining the landlord's permission, he cannot be held to have acted illegally or without justification. We are unable to agree with the view that the prospective tenant, for whose benefit an order under s. 7(2) has been passed, is precluded from taking possession of the accommodation, when he finds it lying vacant, and that he is bound to adopt a course of action that will further the dilatory tactics of a landlord who wishes to delay the implementation of the order. To hold otherwise would run counter to the very aims and objects of the Control of Rent and Eviction Act.

Mr. Kacker lays emphasis on the fact that the landlord in the present case had secured a decree for possession and argues that he was entitled to obtain actual possession of the premises before they could be allotted to any fresh tenant. But we fail to see how the decree could confer on the plaintiff any enhanced rights; he can have no greater claim to possession than a landlord whose tenant has vacated the accommodation voluntarily in the normal course, without being sued. And if an accommodation governed by the provisions of the Control of Rent and Eviction Act, which has been let out to a tenant falls vacant, the landlord is not entitled to take actual possession unless he obtains a release order from the Rent Control Officer under R. 6. The legal position was made clear in *Jangi Lal v. Rent Control and Eviction Officer, Allahabad* (1), in which it was observed:

"If the tenant had left of his own accord and the premises had fallen vacant, the vacant premises

(1) 1958 A.L.J. 584.

could be allotted to a tenant or to the landlord himself, if he wanted to occupy the premises, with the permission of the District Magistrate. In such a case it was not open to the landlord, without the permission of the District Magistrate, to occupy the premises and claim that he was not liable to ejectment under s. 7-A of the Act. To premises to which s. 7 of the Act applies even the landlord's right, on the premises falling vacant, is subject to the District Magistrate and it is not open to the landlord either to let out the premises to a new tenant without an allotment order or even to step in to occupy it without the permission of the District Magistrate. We see no difference between such a case and a case like the present where the premises fell vacant as the tenant had to leave by reason of a decree for ejectment passed by a court of law."

The result is that we find no merit in any of the contentions advanced on behalf of the appellant. The allotment order requiring the premises to be let to Girdhari Lal was perfectly valid; and Girdhari Lal, finding the premises vacant, was fully entitled to occupy them on the strength of that order and cannot be dislodged by the plaintiff-appellant. This second appeal accordingly fails and is dismissed with costs.

Second Appeal dismissed.

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SUPREME COURT

APPELLATE CIVIL

*Before the Hon'ble Mr. Justice Bachawat and the
Hon'ble Mr. Justice Shelat.*

LALLAN PRASAD ... APPELLANT,

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RAHMAT ALI AND ANOTHER ... RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]
Contract Act, IX of 1872, ss. 172, 173, 174, 175 and 176—Pledge and pawn—Debtor executing promissory note and also an agreement to pledge goods as security—Fact of the delivery of goods to pledgee proved, but pledgee denying the pledge and suing on the promissory note—Pledgee—If entitled to recover the balance of the loan.

Where a pawnee files a suit for recovery of debt, though he is entitled to retain the goods, he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to re-deliver the goods on payment and therefore, if he was put himself in a position where he is not able to re-deliver the goods he cannot obtain a decree. In such a case he has to give credit for the value of the goods and can recover only the balance.

Where a promissory note was executed and also goods were pledged as security, but the pledgee denying the pledge filed a suit on the promissory note, but the fact of delivery of goods to him as security was proved.

Held, that the pledgee would not be entitled to a decree against the promissory note and also retain the goods found to be in his custody

Civil Appeal no. 776 of 1964 from the judgment and Decree dated the 15th September, 1961 of the Allahabad High Court in First Appeal no. 280 of 1952.

O. P. Rana, for the Appellant.

J. P. Goyal, for the Respondent.

The following Judgment of the Court was delivered by—

SHELAT, J.:—This appeal by certificate is directed against the judgment and decree passed by the High Court of Allahabad reversing the judgment and decree passed by the Civil Judge, Allahabad, directing the respondents to pay to the appellant Rs.18,142 and costs.

Two questions arise in this appeal: viz., (1) whether the first respondent pledged certain quantity of aeroscrapes purchased by him from military authorities at Bamrauli Depot, Allahabad and delivered possession thereof to the appellant under an agreement of pledge entered into between them and (2) whether the appellant was entitled to any relief when his case was that the first respondent never delivered to him the said goods and the said agreement never ripened into a pledge.

On 10th January, 1946 the appellant advanced Rs.20,000 to the first respondent against a promissory note and a receipt. The first respondent also executed an agreement whereby he agreed to pledge as security for the debt the said aeroscrapes and to deliver them at the appellant's house and keep them there in his custody. The appellant's case, however, was that the first respondent failed to deliver the said goods to him, stored them in a plot adjacent to the aerodrome at Allahabad and therefore the said agreement did not ripen into a pledge. Consequently, he was entitled to recover the amount advanced by him in the suit based on the said promissory note and the said receipt. In his written statement the first respondent admitted the said loan but alleged that in pursuance of the said agreement he delivered 147 tons of aeroscrapes of the value of Rs.35,000 to the appellant. He claimed that the appellant was not entitled to obtain a decree unless he was ready and willing to re-deliver the said goods pledged with him.

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In the Trial Court the appellant besides examining himself also led the evidence of other witnesses. The respondents in their turn led both documentary and oral evidence and relied in particular on certain notices served upon them by the appellant as also certain receipts issued by the appellant in respect of payments made to the appellant against sales by him of part of the said goods.

The Trial Judge, however, rejected the respondents case and held that there was no completed contract of pledge as the first respondent had failed to deliver the said goods, that the second respondent had agreed to become a surety for repayment of the said loan, that thereupon the appellant did not insist on possession of the said goods being given to him and that therefore he was entitled to maintain the suit and recover the said monies. On an appeal by the respondents, the High Court disagreed with the said findings and set aside the said decree. The High Court held that the said goods were delivered to the appellant, that the said agreement did not rest at a mere agreement to pledge but ripened into a pledge and that the appellant was not entitled to any relief in view of his stand that the said goods were never pledged with him and were therefore not in his possession. In the result, the High Court dismissed the appellant's suit with costs.

Mr. *Rana*, for the appellant, challenged both the findings of the High Court and contended (1) that the High Court was not justified in finding that the first respondent had delivered the said goods to the appellant and the said goods therefore remained in his custody and (2) that even if the goods were delivered to the appellant the appellant could under s. 176 of the Contract Act still maintain his suit on the said promissory note and recover the amount due thereunder.

As the High Court's judgment is one of reversal Mr. Rana took us through the relevant portions of the evidence and submitted that on the evidence the findings of the High Court cannot be sustained.

The first question is whether the first respondent after obtaining the aeroscapes from the military authorities delivered them to the appellant. Before however we proceed to consider this question we may first set out certain undisputed facts. There is no dispute that the appellant advanced Rs.20,000 to the first respondent. There is also no dispute that the first respondent executed the said agreement agreeing to pledge the said goods. There is further no dispute that the said goods were stored in a plot near the aerodrome. The dispute between the parties lies therefore within a short compass, viz. whether the custody of the said goods after they were stored at the aforesaid place was with the appellant or with the first respondent.

The first broad fact that inevitably strikes one is that though the first respondent had agreed to hand over the said goods to the appellant and though he failed to do so, the appellant did not at any time protest or call upon him to deliver the goods. Since he had advanced a fairly large amount it would be somewhat unusual, if the said goods were not placed in his possession, not to call upon the first respondent to forthwith deliver the goods. Since a large amount was advanced by him the appellant also would not ordinarily be content merely with a promissory note from the first respondent. The appellant's case, however, was that since he had obtained a guarantee from the second respondent, the father of the first respondent, he did not worry even if the said transaction remained at the stage of an agreement to pledge. But the letter under which the 2nd respondent agreed to be the surety was obtained under different circumstances. Under the said agreement the appellant

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was to permit the first respondent to remove and sell part of the said goods provided he paid to the appellant 3/4th of the sale proceeds. This by itself would presuppose that the goods were under the control and custody of the appellant, for otherwise no question of any permission from the first respondent would arise. The letter of surety from the second respondent itself states that the goods were pledged with the appellant, that the appellant was not allowing the first respondent to remove them for sale and that with a view to assure the appellant that his monies were not in danger the second respondent agreed to make himself responsible for payment of the said loan. This again presupposes that the goods were under the control of the appellant.

Apart from these broad facts there were also other facts on record on the strength of which the High Court arrived at its aforesaid findings.

Since as a pledgee the appellant was entitled to recover from the first respondent such expenses as might be incurred by him for the preservation and safety of the said goods he had appointed certain watchmen whose salaries he claimed in the suit. According to the appellant, he had employed these watchmen in the hope that the goods would be placed in his custody and would require to be watched for their safety. His case further was that as the first respondent did not deliver them and stored them near the Aerodrome, he placed, on a request by the respondents, the services of the watchmen at their disposal. But he could not explain as to why he continued to pay the salaries of the watchmen, though their services were no longer required by him. The explanation given by him in this regard did not impress the High Court and in our view rightly. If the goods were not delivered to the appellant and were never in his custody there was no reason why he should continue to pay the watchmen's salaries. Even assuming that he had

engaged the watchmen in the first instance in the hope that the goods would be placed in his possession, he would have discharged them on the first respondent failing to hand over the goods to him. The only explanation that appears to be acceptable in these circumstances is that he continued to employ those watchmen as the goods were in his possession and required to be safely kept as security.

The evidence shows that on or about 18th August, 1946 the first respondent removed part of the said goods but he did so after paying to the appellant Rs.1,000 towards the principal and Rs.200 towards interest. The removal of these goods and the said payment were simultaneously made. That fact would indicate that the first respondent had removed the said goods with the appellant's consent which again envisages that the goods were at that time in the appellant's charge. In November 1947, 100 maunds of the said aeroscrapes were sold to one Amrit Lal for Rs.1,400. It is significant that Amrit Lal paid Rs.200 by cheque out of the said Rs.1,400 directly to the appellant. The receipt Ex. D in respect of this amount indicates that the appellant was concerned with the sale. If the goods were not in his possession and they were sold by the first respondent without the appellant being concerned with the sale, Amrit Lal would not have directly given the cheque to the appellant. That the appellant was concerned with the said sale becomes also apparent from the fact that in the notice Ex. P given by him to the first respondent he had intimated that he intended to sell 100 maunds out of the goods.

Two notices given by the appellant to the first respondent dated August 4, 1947 and September 11, 1947 furnish clear indications that the appellant was in possession of the said goods. In the first notice he reminded the first respondent that "the aeroscrapes purchased from

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was to permit the first respondent to remove and sell part of the said goods provided he paid to the appellant 3/4th of the sale proceeds. This by itself would presuppose that the goods were under the control and custody of the appellant, for otherwise no question of any permission from the first respondent would arise. The letter of surety from the second respondent itself states that the goods were pledged with the appellant, that the appellant was not allowing the first respondent to remove them for sale and that with a view to assure the appellant that his monies were not in danger the second respondent agreed to make himself responsible for payment of the said loan. This again presupposes that the goods were under the control of the appellant.

Apart from these broad facts there were also other facts on record on the strength of which the High Court arrived at its aforesaid findings.

Since as a pledgee the appellant was entitled to recover from the first respondent such expenses as might be incurred by him for the preservation and safety of the said goods he had appointed certain watchmen whose salaries he claimed in the suit. According to the appellant, he had employed these watchmen in the hope that the goods would be placed in his custody and would require to be watched for their safety. His case further was that as the first respondent did not deliver them and stored them near the Aerodrome, he placed, on a request by the respondents, the services of the watchmen at their disposal. But he could not explain as to why he continued to pay the salaries of the watchmen, though their services were no longer required by him. The explanation given by him in this regard did not impress the High Court and in our view rightly. If the goods were not delivered to the appellant and were never in his custody there was no reason why he should continue to pay the watchmen's salaries. Even assuming that he had

engaged the watchmen in the first instance in the hope that the goods would be placed in his possession, he would have discharged them on the first respondent failing to hand over the goods to him. The only explanation that appears to be acceptable in these circumstances is that he continued to employ those watchmen as the goods were in his possession and required to be safely kept as security.

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the Bamrauli Depot were pawned in lieu of the amount due", that the first respondent had continued to remove part of the said goods and dispose them of contrary to the said agreement, that "accordingly my client engaged servants there for safety of the goods and you are liable for payment of their salaries also in accordance with the terms of the agreement." By this notice the appellant intimated to the first respondent that unless the latter made up the account and paid the remaining balance including interest and the salaries of the said watchmen within a week from the date of the service of the notice he would dispose of "the entire goods pawned and realise his entire dues on account of principal, and interest" etc. The second notice was in the same vein again informing the first respondent that the appellant would settle with some customer and dispose of the said aerocrapes, that he had arranged a customer for 100 maunds, that the said 100 maunds would be sold on the 12th of September, 1947 and that the first respondent could remain present at the time of the sale if he so desired. These two notices were followed by a telegram Ex. C which also gave a similar intimation to the first respondent. It cannot be disputed that through these notices the appellant was informing the first respondent that he intended to exercise his right to sell the said goods pledged with him. These notices are clearly inconsistent with the position adopted by him that the goods were never delivered to him or that they were not pledged with him or that the transaction of pawn had not materialised. His explanation that these notices were sent at the instance of the first respondent to compel the second respondent to pay up the said debt is without any foundation and was rightly rejected by the High Court.

Apart from this documentary evidence which satisfactorily established that the said goods were in his posses-

sion, there was also oral evidence, which if accepted, would prove that the said goods were handed over to the appellant and remained in his control. The most important part of the oral evidence was that of Manmohan Banerjee, the Commissioner appointed by the Court in a suit filed by the Calcutta National Bank against the respondents. In that suit the Court had passed an order of attachment before judgment of the goods belonging to the first respondent. The evidence of Banerjee was that when he went to attach the aeroscrapes belonging to the first respondent he was informed that part of the said goods were in possession of the appellant and that thereupon he refrained from attaching those goods. This evidence shows that at that time it was a well known fact that the aeroscrapes in question were in possession of the appellant.

There were two items of evidence, however, on which the appellant relied to establish that the goods were never in his possession. The first was the evidence of Kedar Nath, the owner of the plot where the said goods were stored. His evidence was that the first respondent had taken the said plot on rent from him in October 1946 and that he was paying the rent therefor. The evidence of Kedar Nath was, however, rejected by the High Court on the ground that he was not in a position to give the exact date on which the said plot was leased to the first respondent and also on the ground that his evidence was not satisfactory to show that the said goods were not stored before October 1946. The second fact relied on by the appellant was that the suit filed by the Calcutta National Bank ultimately failed, that the goods attached by the Bank were thereafter released and some of the goods were thereafter removed by the respondents and the rest by some other persons. It was therefore alleged that the respondents could not have removed those goods if in fact they had been pledged with the

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appellant. But there was no satisfactory evidence to show that the goods attached by the said Bank were the very goods which had been pledged with the appellant. The evidence of Banerjee on the other hand shows the contrary. The fact therefore that the goods attached by the Bank were subsequently released and removed by the respondents would not assist the appellant. In view of these facts we are of the view that the High Court was right in its findings that the said goods were delivered to the appellant, that he was a pledgee thereof and that the said agreement did not rest at the stage of a mere agreement to pledge.

The second question would then be whether the appellant was entitled to recover the balance of the said loan in view of his denial of the pledge and his failure to offer to redeliver the goods. Under the Common Law a pawn or a pledge is a bailment of personal property as a security for some debt or engagement. A pawner is one who being liable to an engagement gives to the person to whom he is liable a thing to be held as security for payment of his debt or the fulfilment of his liability. The two ingredients of a pawn or a pledge are: (1) that it is essential to the contract of pawn that the property pledged should be actually or constructively delivered to the pawnee and (2) a pawnee has only a special property in the pledge but the general property therein remains in the pawner and wholly reverts to him on discharge of the debt. A pawn therefore is a security, where, by contract a deposit of goods is made as security for a debt. The right to property vests in the pledgee only so far as is necessary to secure the debt. In this sense a pawn or pledge is an intermediate between a simple lien and a mortgage which wholly passes the property in the thing conveyed. (See *Halliday v. Holygate*) (1). A contract to pawn a chattel even though money is advanced on the faith of it is not sufficient in itself

(1) (1868) LR 3 Ex. 299.

to pass special property in the chattel to the pawnee. Delivery of the chattel pawned is a necessary element in the making of a pawn. But delivery and advance need not be simultaneous and a pledge may be perfected by delivery after the advance is made. Satisfaction of the debt or engagement extinguishes the pawn and the pawnee on such satisfaction is bound to redeliver the property. The pawner has an absolute right to redeem the property pledged upon tender of the amount advanced but that right would be lost if the pawnee has in the meantime lawfully sold the property pledged. A contract of pawn thus carries with it an implication that the security is available to satisfy the debt and under this implication the pawnee has the power of sale on default in payment where time is fixed for payment and where there is no such stipulated time on demand for payment and on notice of his intention to sell after default. The pawner however has a right to redeem the property pledged until the sale. If the pawnee sells, he must appropriate the proceeds of the sale towards the pawner's debt, for, the sale proceeds are the pawner's monies to be so applied and the pawnee must pay to the pawner any surplus after satisfying the debt. The pawnee's right of sale is derived from an implied authority from the pawner and such a sale is for the benefit of both the parties. He has a right of action for his debt notwithstanding possession by him of the goods pledged. But if the pawner tenders payment of the debt the pawnee has to return the property pledged. If by his default the pawnee is unable to return the security against payment of the debt, the pawner has a good defence to the action (1). This being the position under the common law, it was observed in *Trustees of the Property of Ellis & Co. v. Dixon-Johnson* (2) that if a creditor holding security sues for the debt, he is under an obligation on payment of the debt to hand over the security, and

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(1) Halsbury's Law of England, 3rd ed. Vol. 29 page 221.

(2) 1925 A.C. 489.

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that it, having improperly made away with the security he is unable to return it to the debtor he cannot have judgment for the debt.

There is no difference between the common law of England and the law with regard to pledge as codified in ss. 172 to 176 of the Contract Act. Under s. 172 a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. S. 173 entitles a pawnee to retain the goods pledged as security for payment of a debt and under s. 175 he is entitled to receive from the pawner any extraordinary expenses he incurs for the preservation of the goods pledged with him. S. 176 deals with the rights of a pawnee and provides that in case of default by the pawner the pawnee has (1) the right to sue upon the debt and to retain the goods as collateral security and (2) to sell the goods after reasonable notice of the intended sale to the pawner. Once the pawnee by virtue of his right under s. 176 sells the goods the right of the pawner to redeem them is of course extinguished. But as aforesaid the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawner. So long, however, the sale does not take place the pawner is entitled to redeem the goods on payment of the debt. It follows therefore that where a pawnee files a suit for recovery of debt, though he is entitled to retain the goods he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to redeliver the goods on payment of the debt and therefore if he has put himself in a position where he is not able to redeliver the goods he cannot obtain a decree. If it were otherwise, the result would be that he would recover the debt and also retain the goods pledged and the pawner in such a case would be placed in a position where he incurs a greater liability than he bargained for under the contract of pledge. The pawnee therefore

can sue on the debt retaining the pledged goods as collateral security. If the debt is ordered to be paid he has to return the goods or if the goods are sold with or without the assistance of the court and appropriate the sale proceeds towards the debt. But if he sues on the debt denying the pledge, and it is found that he was given possession of the goods pledged and had retained the same, the pawner has the right to redeem the goods so pledged by payment of the debt. If the pawnee is not in a position to redeliver the goods he cannot have both the payment of the debt and also the goods. Where the value of the pledged property is less than the debt and in a suit for recovery of debt by the pledgee, the pledgee denies the pledge or is otherwise not in a position to return the pledged goods he has to give credit for the value of the goods and would be entitled then to recover only the balance. That being the position the appellant would not be entitled to a decree against the said promissory note and also retain the said goods found to have been delivered to him and therefore in his custody. For, if it were otherwise the first respondent as the pawner would be compelled not only to pay the amount due under the promissory note but lose the pledged goods as well. That certainly is not the effect of s. 176. The contentions urged by Mr. Rana therefore must be rejected.

The appeal fails and is dismissed with costs.

Appeal dismissed.

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APPELLATE CIVIL

Before Mr. Justice Jagdish Sahai and Mr. Justice
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(APPELLANTS)

v.

MOHAMMAD AFAQ (RESPONDENT)

U. P. Panchayat Raj Act, 1947, ss. 2(ss), 95(1)(g), 96-A; s. 2 (ss)—Expression 'Appropriate Authority', Meaning of—'designate' and 'appoint', Difference between—Order under s. 95(1)(g) passed by Additional S. D. O. and approved by D. M.—right of filing the appeal to D. M. not lost—Rule 'one should not hear cases against his own decision', Basis of;—Delegation of power—Power can be exercised either by delegator or the delegatee—Superintendence by High Court over judicial—Constitution of India, 1950, Art. 227.

The expression "appropriate authority" in s. 2(ss) of the U. P. Panchayat Raj Act means the authority competent to designate or appoint an Additional Sub-Divisional Officer. The difference between designate and appoint is this that an officer already holding a post may also be designated as Additional Sub-Divisional Officer whereas a person may be appointed only as Additional Sub-Divisional Officer having no other functions to discharge.

There is a clear difference between the competency of an appeal and the right of a particular presiding officer to hear it. The particular District Magistrate concerned having approved of the order of removal passed by the Additional Sub-Divisional Officer may be said to have disqualified himself from hearing the appeal but it cannot be said that the right of filing the appeal itself was lost. The rule that one should not hear cases against his own decision is based on a rule of public policy and on principles of natural justice that no party shall be judge of his own cause. The rule is based on notions of propriety and on the principle that not only justice should be done but it should also seem to be done.

It is well settled that merely because power is delegated, the delegator does not lose the power. It can be exercised either by the delegator or the delegatee.

*While sitting at Lucknow.

By virtue of the provisions of Art. 227 of the Constitution of India High Court has superintendence over the tribunal (District Magistrate) also and can consequently in a fit case transfer a case pending before that tribunal to another tribunal of equal status.

Case-law discussed.

Gaya Dutt v. S. D. O. (1) distinguished.

Special Appeal No. 159 of 1965 against the judgment dated 2nd November, 1965 passed by SAHGAL, J. in Writ Petition No. 439 of 1963.

The facts appear in the judgment.

Jai Shanker Trivedi, for the appellant.

P. N. Bhatt, for the State not present.

The following judgment of the court was delivered by—

JAGDISH, SAHAI, J.:—This special appeal is directed against the judgment of G. D. SAHGAL, J., dated 2nd November, 1965, allowing Writ Petition No. 439 of 1963, filed by the respondent Mohammad Afaq who was the Pradhan of Gaon Sab'ha of village Nuranda, tahsil Kaiserganj, district Bahraich. Certain complaints were received against Mohammad Afaq by the Additional Sub-divisional Officer who framed charges against him, held an open enquiry and removed him from the post of Pradhan by means of an order dated 10th June, 1963. This order of the Additional Sub-Divisional Officer was approved by the Deputy Commissioner, Bahraich.

Mohammad Afaq challenged the order of removal by filing Writ Petition No. 439 of 1963. That petition came up for hearing before SAHGAL, J. before whom the following three submissions were made:

1. That the petitioner-respondent could be removed only by means of an application made under s. 12-C of the U. P. Panchayat Raj Act (hereinafter referred to as the Act) questioning his election and not by means of an order of removal.

(1) 1964 A.L.J. 145.

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2. The Additional Sub-Divisional Officer had no jurisdiction to pass an order of removal of the petitioner.

3. That inasmuch as the order passed by the Additional Sub-Divisional Officer was approved by the District Magistrate, the petitioner-respondent lost his right of appeal to the Deputy Commissioner (District Magistrate) and for that reason the order of removal cannot be sustained.

On behalf of the appellant, State, Sri J. S. Trivedi, the learned Senior Standing Counsel, has challenged the findings of SAHGAL, J. on the two submissions upheld by him and has also contended that the petitioner-respondent having acquiesced in the inquiry before the Additional Sub-Divisional Officer, not having objected to his jurisdiction before him or before the District Magistrate, was not entitled to any relief from this Court under Art. 226 of the Constitution of India.

The first question that we would like to consider is whether the Additional Sub-Divisional Officer had jurisdiction to hold the enquiry against the petitioner-respondent and remove him from the office of the Pradhan. The power of removal is purported to have been exercised under s. 95(1)(g) of the act which reads:

"The State Government may—

.....
(g) suspend or remove a member of a Gaon Panchayat or joint committee or Bhumi Prabandhak Samiti, an office-bearer of a Gaon Sabha or a Panch, Sahayak Sarpanch or Sarpanch or a Nyaya Panchayat, if he. . . ."

Admittedly, a Pradhan is an office-bearer of a Gaon Sabha. Consequently, he could be removed under cl. (g) of s. 95(1) of the Act. Under this provision it is the

State Government that can pass the order of removal. However, the State Government has issued a notification no. 4483-P/XXXIII—50-57, dated the 9th May, 1958 published in the *State Gazette*, dated 17th May, 1958. This notification reads:

“In exercise of the powers conferred by s. 96-A of the U. P. Panchayat Raj Act, 1947 (U. P. Act no. XXVI of 1947), the Governor is pleased to delegate the powers of the State Government under cl. (g) of sub-s. (1) of s. 95 of the said Act, to the Sub-Divisional Officers subject to the conditions that no order for removal shall take effect unless it is confirmed by the District Magistrate within a period of thirty days from the date on which the order was passed by the Sub-Divisional Officer.”

By means of the notification no. 4483-P/XXXIII—50-57, dated the 19th of December, 1958, published in the *Uttar Pradesh Gazette* dated the 27th of December, 1958, the order of removal was made subject to appeal before the District Magistrate within thirty days from the date of such order and the approval of the District Magistrate was not required.

The State Government has jurisdiction to delegate their powers under s. 96-A of the Act which reads:

“Delegation of powers by State Government. The State Government may delegate all or any of its powers under this Act to any officer or authority subordinate to it subject to such conditions and restrictions as it may deem fit to impose.”

The power has been delegated to the “Sub-Divisional Officer concerned”, and we have to give some meaning to the word ‘concerned’, which has deliberately been used. The word ‘concerned’ means the particular Sub-Divisional Officer under whose territorial jurisdiction the Gaon Samaj is located. Mr. *Trivedi* places reliance

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on s. 2(33) of the Act to show that an Additional Sub-Divisional Officer is also a Sub-Divisional Officer. That provision reads:

“ ‘Sub-Divisional Officer’ includes an Additional Sub-Divisional Officer designated or appointed as such by the Appropriate authority.”

The expression ‘Appropriate authority’ has not been defined in the Act. We have therefore to give it the dictionary meaning. It therefore means the authority competent to designate or appoint an Additional Sub-Divisional Officer. The difference, between ‘designate’ and ‘appoint’ is this that an officer already holding a post may also be designated as Additional Sub-Divisional Officer whereas a person may be appointed only as Additional Sub-Divisional Officer having no other functions to discharge. In the present case, there is no controversy that the Additional Sub-Divisional Officer who passed the impugned order had been appointed as Additional Sub-Divisional Officer by the appropriate authority. The question therefore that has to be answered is not whether the expression ‘Sub-Divisional Officer’ would normally include an Additional Sub-Divisional Officer, but whether in this case the delegation by the State Government has been made only in favour of the Sub-Divisional Officer or it has also been made in favour of the Additional Sub-Divisional Officer. This is a question of fact and not one of law and would depend upon a correct interpretation of the notification issued by the State Government delegating its powers under s. 95(1)(g) of the Act. We have carefully read the notification issued by the Government delegating its powers. In our opinion, S. D. O. concerned is not comprehensive enough to include an Additional Sub-Divisional Officer, otherwise the word ‘concerned’ would have no meaning.

Mr. *Trivedi* has contended that the view of SAHGAL, J. that s. 2(ss) of the Act would not be applicable to the present case because that requires that the particular officer "should be designated or appointed as such by the appropriate authority, i.e. he should be designated or appointed as a Sub-Divisional Officer", is not correct. We agree with Mr. *Trivedi* on this point. Obviously, if a particular officer is designated or appointed as Sub-Divisional Officer, there can be no occasion to attempt to comprehend him in the expression 'Sub-Divisional Officer' as defined by s. 2(ss) of the Act. In that case, no question of inclusion would arise because he would be a fullfledged Sub-Divisional Officer. The question of inclusion can only arise in a case where a person is designated or appointed as an Additional Sub-Divisional Officer; yet by the help of s. 2(ss) of the Act he is to be treated as a Sub-Divisional Officer.

Mr. *Trivedi* has also contended that SAHGAL, J. erred in placing reliance upon *Gaya Dutt v. S. D. O.* (1). He contends that that case is clearly distinguishable. We agree with Mr. *Trivedi* that that case can have no application to the case before us. While dealing with s. 2(ss) of the Act the learned Judges who decided that case observed as follows:

"S. 2(ss) of the Panchayat Raj Act lays down that 'Sub-Divisional Officer includes an Additional Sub-Divisional Officer designated or appointed as such by the appropriate authority'. We do not think that this provision helps the opposite-party. Since there is no evidence that Sri Saun Ram was designated by the State Government as Additional Sub-Divisional Officer he cannot be included within the meaning of Sub-Divisional Officer". Further, an election petition must be presented before 'the' Sub-Divisional Officer, it must be presented to 'the'

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Sub-Divisional Officer, and cannot be presented to either of them according to the choice of the petitioner. No choice has been given to a petitioner to select the officer to whom he should present the election petition. When an Assistant Collector of the first class is placed in charge of a sub-division and another officer has been designated by the State Government as Additional Sub-Divisional Officer, though both come within the definition of Sub-Divisional Officer contained in s. 2(ss), only the former can be said to be the Sub-Divisional Officer."

It would therefore appear from this decision, that the learned Judges held that by virtue of the definition contained in s. 2(ss) of the Act an Additional Sub-Divisional Officer would be comprehended in the expression Sub-Divisional Officer. The reason why in that case the learned Judges did not uphold the order passed by Sri Saun Ram was firstly because there was no evidence to show that he had been designated or appointed by the State Government as the Additional Sub-Divisional Officer, and secondly, because the learned Judges were of the view that even though an Additional Sub-Divisional Officer was comprehended in the expression Sub-Divisional Officer, the Additional Sub-Divisional Officer could not entertain the election petition because the same could be presented before one officer only and the law had conferred the right to receive such a petition on the Sub-Divisional Officer.

Even though that is so, the case of Mr. *Trivedi* does not in any manner improve because we have already pointed out that under the terms of delegation made by the State Government, an Additional Sub-Divisional Officer is not included and that by the expression "S. D. O. concerned" was meant that particular Sub-Divisional Officer who is incharge of the sub-division in which the Gram Samaj is located. We are therefore of

the view that the Additional Sub-Divisional Officer had no jurisdiction to remove the petitioner-respondent from the post of Pradhan.

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Inasmuch as the requirement of law at the relevant time was not that the order of the Sub-Divisional Officer would have to be approved by the District Magistrate but an appeal to him had been provided, approval of the District Magistrate in this particular case was unnecessary. S. 96-A of the Act clearly provides that the State Government may delegate its powers to any authority subordinate to it subject to such conditions and restrictions as it may deem fit to impose. The expression 'such conditions' is wide enough to include the condition of an appeal being made against the order of the Sub-Divisional Officer to the District Magistrate. We are therefore satisfied that an appeal did lie to the District Magistrate in the instant case. That being the position, the petitioner-respondent could have presented an appeal to the District Magistrate concerned. It is true that the District Magistrate had approved of the order of removal passed by the Additional Sub-Divisional Officer but that by itself did not prevent the petitioner from filing an appeal. The petitioner may have had reasons to believe that the District Magistrate would stick to his view and would not vary in appeal the order passed by the Additional Sub-Divisional Officer but the hope of success of appeal is quite different from the right to file an appeal. If the petitioner-respondent did not file an appeal, he is himself to blame. Merely because the particular District Magistrate had approved of the order of removal does not mean that the right of appeal was lost. There is a clear difference between the competency of an appeal and the right of a particular presiding officer to hear it. The particular District Magistrate concerned having approved of the order of removal passed by the Additional Sub-Divisional Officer may be

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said to have disqualified himself from hearing the appeal but it cannot be said that the right of filing the appeal itself was lost.

Clearly if the District Magistrate concerned had been succeeded by another officer there was no bar to the successor hearing the appeal. We are therefore of the opinion that the view taken by SAHGAL, J. that the right of appeal itself was lost is not correct.

It may be contended on behalf of the respondent that even though in law a right of appeal may exist, such a right will be illusory in view of the circumstance that the appeal would be heard by an officer who had approved of the order of removal. We are unable to agree. In the first place, there is no absolute bar to the hearing of the appeal by the particular District Magistrate who had approved of the order of removal. The rule that one should not hear cases against his own decisions is based on a rule of public policy and on principles of natural justice that no party shall be judge of his own cause. Such a rule exists in s. 556 of the Code of Criminal Procedure, which reads:

"No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself. . . ."

To the same effect is s. 38 of the Bengal, Agra and Assam Civil Court Act, 1887, which reads:

"(1) The Presiding Officer of a Civil Court shall not try any suit or other proceeding to which he is a party or in which he is personally interested.

(2) The Presiding Officer of an appellate Civil Court under this Act shall not try an appeal against

a decree or order passed by himself in another capacity.

(3) When any such suit, proceeding or appeal as is referred to in sub-s. (1) or sub-s. (2) comes before any such officer, the officer shall forthwith transmit the record of the case to the Court to which he is immediately subordinate, with a report of the circumstances attending the reference.

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(4) The superior Court shall thereupon dispose of the case under s. 25 of the Code of Civil Procedure.

(5) Nothing in this section shall be deemed to affect the extraordinary original civil jurisdiction of the High Court."

The rule is based on notions of propriety and on the principle that not only justice should be done but it should also seem to be done. We are dilating on this point only to emphasise that it is not a complete ouster of jurisdiction but only a rule of propriety and a principle of natural justice. It is not that if the petitioner-respondent had filed an appeal no one else than the District Magistrate concerned could or would have heard it. The District Magistrate was exercising only the delegated powers of the State Government. It is well settled that merely because power is delegated, the delegator does not lose the power. It can be exercised either by the delegator or the delegatee. (See *Gordan, Dadds & Co., v. Morris* (1). At page 621 of these reports, it has been observed:

"The first point which I have to consider is whether a competent authority, when it delegates some of its powers under reg. 51, divests itself of those powers. The effect of delegation was considered in *Huth v. Clarke* (2). I need not deal with

(1) 1945 All. England Law Reports 616. (2) 25 Q.B.D. 391, 394, 395.

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the view that powers under s. 107 of 1915—19 Government of India Act extended to make an order of transfer in a fit case from one court to another. It is true that in the Allahabad case the transfer was made from a court which was under the administrative control of the High Court to another court which was also under its administrative control. We are citing that case only to show that the power to transfer a case can be culled out from the provisions of Art. 227 of the Constitution of India. That Article is only the present version of s. 107 of 1915—19 Government of India Act. We are not giving any considered opinion on the question as to whether or not in a case like this Court should exercise its powers of transfer. We are only saying that the respondent was not quite remediless merely because the District Magistrate had approved of the order of removal passed by the Additional Sub-Divisional Officer. We do not even know whether that particular District Magistrate is still at Bahraich nor do we know how long he was there. This question becomes relevant because admittedly the successor of that District Magistrate would have been perfectly qualified to hear any appeal filed by the respondent against the order of the Additional Sub-Divisional Officer removing him from the post of Pradhan.

For the reasons mentioned above, we are of the opinion that an appeal did lie in the instant case and the respondent prejudiced his own case by not filing one. This is one of the grounds on which we feel that this Court should not have exercised its powers under Art. 226 of the Constitution of India. We would also like to point out that the respondent never objected to the enquiry made by the Additional Sub-Divisional Officer nor did he challenge his jurisdiction either before himself (Additional Sub-Divisional Officer) or before the District Magistrate. Under the circumstances, we are of

the opinion that the learned single judge should not have exercised its discretionary powers under Art. 226 of the Constitution of India. For the view that we are taking we find support from *M/s. Pannalal Binjrai v. Union of India* (1) and *K. N. Halwai v. Registrar Co-operative Society* (2).

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For the reasons mentioned above, we allow this appeal, set aside the order of SAHGAL, J., dated 2nd November, 1965, and dismiss Writ Petition No. 439 of 1963. In view of the fact that the appeal was not contested and no one appeared on behalf of the respondent, there is no order as to costs.

Appeal allowed.

(1) A.I.R. 1957 S.C. 397.

(2) 1965 A.L.J. 20.

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the facts of that case, but in his judgment Lord COLERIDGE, C. J., said:

But delegation does not imply a denudation of power and authority; the 6th schedule of the Act (that is the Act with which he was dealing) provides that the delegation may be revoked or altered and the powers resumed by the executive committee. The word "delegation" implies that powers are committed to another person or body which are as a rule always subject to resumption by the power delegating, and many examples of this might be given.

In the same case WILLS, J., said (1):

Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself.

Counsel for the plaintiffs sought to distinguish this case by suggesting that the word 'delegate' as used in Reg. 51(5), was not used in its ordinary sense, but had a special meaning. There is nothing in the context of the regulation which enables me to accept this view. I am of opinion that the word 'delegate' in Reg. 51(5), is used in its ordinary meaning, and a delegation by a competent authority of its powers under Reg. 51 does not divest that authority of any of its powers under that regulation."

The respondent could after filing the appeal, therefore, approach the State Government to look into the matter itself and the State Government being the delegator and having been vested with the power under the provisions of the Act could have redressed any legitimate

(1) 25 Q.B.D. 391, 394, 395.

grievance of the respondent including the cancellation of the order of removal passed against him by the Additional Sub-Divisional Officer.

There is also authority to support the view that the petitioner could move this court under Article 227 of the Constitution of India to have this appeal transferred to another District Magistrate. In *Pestanji & Co. v. Collr. of West Khandesh* (1), the question that arose before a Division Bench of the Bombay High Court was whether under s. 107 of the 1915—19 Government of India Act, the Bombay High Court had the power to direct a transfer of any suit from the court of the Mewas Agent to any other court of equal or superior jurisdiction. The Division Bench held that having supervisory powers under s. 107 of the 1915—19 Government of India Act, the High Court could transfer a case pending before the court of Mewas Agent to the Court of a District Judge even though the court of Mewas Agent was not under the administrative control of the Bombay High Court. It is noteworthy that the ground on which transfer was sought in the Bombay case is practically the same as in our case. There the petitioner had “applied to the Mewas Agent that he himself in his capacity as the Court of wards was now the defendant in the case and in that anomalous position could not try the suit, and requested him to move Government to transfer the suit to any other Court for trial”. There can be no manner of doubt that the Collector while hearing the appeal would be acting as a tribunal having quasi-judicial powers. By virtue of the provisions of Art. 227 of the Constitution of India this Court has superintendence over that tribunal also and can consequently in a fit case transfer a case pending before that tribunal to another tribunal of equal status.

In (*Firm*) *Khuni Lal Lachminarain v. (Firm) Narain Das-Gopal Das* (2), a Division Bench of this Court took

(1) A.I.R. 1927 Bom. 272.

(2) A.I.R. 1935 All. 750.

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the view that powers under s. 107 of 1915—19 Government of India Act extended to make an order of transfer in a fit case from one court to another. It is true that in the Allahabad case the transfer was made from a court which was under the administrative control of the High Court to another court which was also under its administrative control. We are citing that case only to show that the power to transfer a case can be culled out from the provisions of Art. 227 of the Constitution of India. That Article is only the present version of s. 107 of 1915—19 Government of India Act. We are not giving any considered opinion on the question as to whether or not in a case like this Court should exercise its powers of transfer. We are only saying that the respondent was not quite remediless merely because the District Magistrate had approved of the order of removal passed by the Additional Sub-Divisional Officer. We do not even know whether that particular District Magistrate is still at Bahraich nor do we know how long he was there. This question becomes relevant because admittedly the successor of that District Magistrate would have been perfectly qualified to hear any appeal filed by the respondent against the order of the Additional Sub-Divisional Officer removing him from the post of Pradhan.

For the reasons mentioned above, we are of the opinion that an appeal did lie in the instant case and the respondent prejudiced his own case by not filing one. This is one of the grounds on which we feel that this Court should not have exercised its powers under Art. 226 of the Constitution of India. We would also like to point out that the respondent never objected to the enquiry made by the Additional Sub-Divisional Officer nor did he challenge his jurisdiction either before himself (Additional Sub-Divisional Officer) or before the District Magistrate. Under the circumstances, we are of

the opinion that the learned single judge should not have exercised its discretionary powers under Art. 226 of the Constitution of India. For the view that we are taking we find support from *M/s. Pannalal Binjrai v. Union of India* (1) and *K. N. Halwai v. Registrar Co-operative Society* (2).

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For the reasons mentioned above, we allow this appeal, set aside the order of SAHGAL, J., dated 2nd November, 1965, and dismiss Writ Petition No. 439 of 1963. In view of the fact that the appeal was not contested and no one appeared on behalf of the respondent, there is no order as to costs.

Appeal allowed.

(1) A.I.R. 1957 S.C. 397.

(2) 1960 A.L.J. 20.

SUPREME COURT

APPELLATE CIVIL

*Before the Hon'ble Mr. Justice Wanchoo, the Hon'ble
Mr. Justice Bachawat and the Hon'ble Mr.
Justice Shelat*

1966
December,
16.

PREM BALLABH KHULBE (APPELLANT)

v.

MATHURA DATT BHATT (RESPONDENT)

(ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD)

Code of Civil Procedure, (Act V of) 1908, s. 51, proviso (c)—
Indian Partnership Act (IX of) 1932, ss. 9, 15, 18, 46 and 48—
Indian Trust Act (II of) 1882, ss. 88, 94 and 95—Partnership
assets or money in the hands of a partner—Whether in a
fiduciary capacity—Liability of managing partner for deten-
tion in prison in execution of decree for the same.

In the absence of special circumstances a partner can not be regarded as a kind of trustee for other partners or liable to render accounts to them in a fiduciary capacity. The managing partner is, as such, not liable to detention in prison under cl. (c) of the proviso to s. 51 of the Code of Civil Procedure in execution of the money decree against him for the partnership assets.

Civil Appeal No. 615 of 1964 from the Judgment and Decree of the Allahabad High Court in Execution First Appeal No. 332 of 1956 decided on 3rd March, 1960.

C. B. Agarwala, (K. P. Gupta, with him) for the Appellant.

S. G. Patwardhan, (Yashpal Singh and M. S. Gupta with him) for the Respondent.

The following judgment of the Court was delivered by—

BACHAWAT, J.:—The appellant, the respondent and two other persons carried on business in partnership

under the name and style of Nayagaon Farm. The respondent was the managing partner and was incharge of the partnership assets. The firm was dissolved and a suit was instituted by the appellant for the taking of the accounts of the dissolved firm. Eventually a final decree was passed in the suit in favour of the appellant against the respondent for Rs.17,143-11 and Rs.3,171-6 as on account of costs. The appellant applied for execution of the decree by arrest and detention of the respondent in prison. In his affidavit in support of the application, the appellant relied upon the grounds mentioned in cls. (a) and (b) of the *proviso* to s. 51 of the Code of Civil Procedure 1908. At the hearing of the application those grounds were not pressed but his counsel relied upon the ground mentioned in cl. (c) of the *proviso*. By cl. (c) the *proviso* to s. 51, the court is empowered to order execution of a money decree by detention of the judgment debtor in prison if it is satisfied "that the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account". The executing court held that the provisions of cl. (c) were satisfied and issued a warrant for the arrest of the respondent. On appeal, the High Court of Allahabad set aside this order. The decree-holder now appeals to this Court under a certificate granted by the High Court.

On behalf of the appellant our attention was drawn to ss. 9, 15, 18, 46 and 48 of the Indian Partnership Act, 1932 and ss. 88, 94 and 95 of the Indian Trusts Act 1882, and it was urged that the respondent as the managing partner of the firm was bound in a fiduciary capacity to account for the assets of the partnership in his hands and the decree against him must be regarded as a decree for a sum for which he was bound in a fiduciary capacity to account.

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On the question whether a fiduciary relation exists between the partners the law is stated thus in Halsbury's Laws of England, 3rd Edition, Vol. 38, Art. 1363, p. 820:

"Partnership itself does not create a fiduciary relation between the partners or make one of them a trustee for the other or for his representatives. The relation may, however, arise on the death of one of them or be created by other special circumstances."

This statement of law is consistent with the provisions of the Indian Partnership Act, 1932 and the Indian Trusts Act, 1882.

In *Piddocke v. Burt* (1), CHITTY, J., held that a partner failing to pay moneys in his hands and received by him on account of the partnership was not liable to be imprisoned under s. 4(3) of the Debtors Act, 1869 as a person "acting in a fiduciary capacity" within the meaning of that statute. He said:

"I should be straining the law if I were to hold that a partner receiving money on account of the partnership—that is, on behalf of himself and his co-partners—received it in a fiduciary capacity towards the other partners. The law allows one partner—one of several joint creditors—to receive the whole debt on account of the firm to whom it is due, and I am unable to recognise any such distinction, as was endeavoured to be made by Mr. Church, between the case of a partner receiving money of the firm and not accounting for it, and that of a partner over-drawing the partnership account; because if this distinction were true, it would apply to every case where one partner wrongly over-draws the partnership account."

This decision was approved of by Lord ATKINSON in *Rodriguez v. Speyer Brothers* (2) and by HARRIES, C. J. in *Bhuban Mohan Rana v. Surender Mohan Das* (3). The last case received the approval of this Court in *Velji*

(1) (1894) 1 Ch. 343.

(3) I.L.R. (1952) 2 Cal. 123.

(2) (1919) A.C. 5989.

Raghavji Patel v. State of Maharashtra (1). A partner must observe the utmost good faith in his dealings with the other partners. He is bound to render accounts of the partnership assets in his hands. But in the absence of special circumstances he cannot be regarded as a kind of trustee for the other partners or liable to render accounts to them in a fiduciary capacity.

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In the present case the respondent as the managing partner was liable to render accounts of the partnership assets in his hands. On the taking of the accounts it was found that he overdrew the partnership account and a decree for the sum due was passed against him. No fraud or clandestine dealing is alleged or proved. On these facts it is not possible to say that the decree was for a sum for which he was bound to account in a fiduciary capacity. The High Court rightly held that the conditions of cl. (c) of the proviso to s. 51 of the Code of Civil Procedure were not satisfied.

The appeal is dismissed. There will be no order as to costs.

Appeal dismissed.

(1) (1965) 2 S.C.R. 429

SUPREME COURT

APPELLATE CIVIL

1967

February, 8.

*Before the Hon'ble Mr. Justice Shah and the Hon'ble
Mr. Justice Ramaswami*

SHANTI SWARUP

... APPELLANT,

v.

MUNSHI SINGH AND OTHERS ... RESPONDENTS

(ON APPEAL FROM THE HIGH COURT AT
ALLAHABAD)

Contract Act IX of 1872, s. 124—Contract for indemnity—If can be implied—Provision in a conveyance whereby purchaser agrees to pay off an encumbrancer—If gives rise to a contract of indemnity—Failure to pay—Remedy—Limitation for—Date of the accrual of cause of action for a suit for indemnity—Applicability of Art. 83 Limitation Act to implied contract of indemnity,—Limitation Act, IX of 1908, Arts. 83, 115 and 116.

Where there is a Covenant in a conveyance of sale whereby the purchaser agreed to pay off an encumbrancer, a contract of indemnity is implicit, and, such a contract may be implied. The failure to discharge the encumbrance within such time as provided expressly or impliedly may give rise to two different causes of action. Firstly, the vendor is entitled to bring an action to have himself put in a position to meet the liability which the purchaser failed to discharge. In such a case, the limitation will run under Art. 116, Limitation Act (or under Art. 115 where the deed is unregistered) from the date on which the purchaser ought to have paid off the encumbrance. Secondly, the vendor, if he incurs loss, may also sue on the contract of indemnity to which Art. 83 Limitation Act would apply, even though the contract is implied.

The cause of action for a suit on a contract of indemnity, where the encumbrance was a mortgage, arises not on when the final decree on the mortgage is passed but when the vendors are actually demnified. (In this case when the vendor was obliged to execute self liquidating mortgage).

Case-law discussed.

Civil Appeal No. 784 of 1964 from the Judgment and Decree dated the 23rd January, 1959 of the Allahabad High Court in First Appeal No. 139 of 1946.

B. C. Misra, (P. K. Ghosh, with him) for the Appellant.

S. T. Desai (Sardar Bahadur and Arun B. Saharya, with him) for the Respondent Nos. 1 to 9.

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The following Judgment of the Court was delivered by—

RAMASWAMI, J.:—This appeal is brought, by certificate, from the judgment of the High Court of Allahabad dated 23rd January, 1959, in First Appeal No. 139 of 1946.

Some of the plaintiff-respondents and the predecessor-in-interest of other plaintiff-respondents owned lands in mahal Narain Singh village Khetalpur Sahruiya. They executed a simple mortgage of this property on 9th May, 1914, in favour of two persons Bansidhar and Khub Chand, for a sum of Rs.12,000. Subsequently a sale-deed of half of this property which had been mortgaged was executed by the owners (now represented by the plaintiff-respondents) on 9th February, 1920, in favour of Shanti Saran, the first appellant and three others, the remaining appellants. The consideration for the sale-deed was a sum of Rs.16,000 out of which a sum of Rs.13,500 was left with the purchasers for payment of the amount due to the mortgagees on account of principal and interest under the mortgage dated 9th May, 1914. The purchasers entered into possession of the property conveyed to them but neither they nor the appellants made any payment to the mortgagees who in due course brought a suit against the respondents for the recovery of the amount due to them under the mortgage. On 4th February, 1937, a final mortgage decree was passed in their favour for a little over Rs.26,000. Thereafter the respondents made an application under the U. P. Encumbered Estates Act, and

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by an order dated 22nd May, 1939, the Special Judge apportioned the liability for the mortgage debt between the respondents and the purchasers as owners of half the mortgaged property. As a result of this apportionment the respondents and the appellants were each held to be liable for the sum of Rs.14,307-9-6. It was further provided in this order that the respondents would be liable to pay interest at 6 per cent per annum on the amount due by them from 1st August, 1933, up till 28th September, 1936, and thereafter at $4\frac{1}{2}$ per cent per annum. The Collector subsequently took proceedings for liquidation of the debt and on 30th January, 1943, the Collector directed the execution by the respondents of a self-liquidating mortgage of three-fourths of the half share of the property of which they were the owners. That mortgage which was for the sum of Rs.20,803/4/3 was executed on 25th February, 1943, and as a result the respondents had to deliver possession of this share of the property to the mortgagees. The respondents thereafter filed the suit out of which this appeal arises for the recovery of the sum of Rs.18,500 and interest representing the loss they had sustained owing to the failure of the appellant or of his predecessors-in-interest to discharge the original mortgage of 9th May, 1914. This suit was instituted on 30th July, 1943. The case of the plaintiff-respondents was that they had actually suffered loss and injury as a result of the breach of trust by the defendant-appellant on 25th February, 1943 when they were compelled to execute the self-liquidating mortgage and to deliver possession of the property in the proceedings for liquidation of that debt which had been decreed by the Special Judge under the U. P. Encumbered Estates Act. On behalf of the defendant-appellant it was pleaded that the suit was time-barred. The contention was that the claim of the plaintiff-respondents was a claim for compensa-

tion for breach of contract which was entered into by a registered document, so that the period of limitation was six years from the date on which the breach of contract had been committed. It was said that the breach of contract should be deemed to have been committed in the year 1920 when the defendant-appellant undertook to pay the money to the mortgagees and failed to do so within a reasonable time. The trial court overruled the objection of the defendant and decreed the suit. The defendant appealed to the High Court. The Division Bench which heard the appeal in the first instance referred the question of limitation to a Full Bench of five Judges which held that the suit was governed by Art. 83 read with Art. 116 of the Limitation Act and that time ran from 25th February, 1943, which was the date upon which the respondents were compelled to execute a self-liquidating mortgage for the purpose of satisfying the mortgage debt. On receipt of the decision of the Full Bench, the Division Bench of the High Court dismissed the appeal and affirmed the judgment of the trial court.

The question to be considered in this appeal is whether the High Court was right in taking the view that in the circumstances of the present case the suit is governed by Art. 83 read with Art. 116 of the Limitation Act and whether the *terminus a quo* for the limitation was 25th February, 1943, which was the date upon which the respondents were compelled to execute a self-liquidating mortgage.

On behalf of the appellant Mr. B. C. Misra put forward the argument that a provision in a conveyance whereby the purchaser agrees to pay off an encumbrancer does not give rise to any contract of indemnity and that the appropriate article of Limitation Act was Art. 116 and not Art. 83 and time began to run from

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the date from which the covenant to pay off the encumbrancer is broken. We are unable to accept this argument as correct. If a conveyance contains a covenant by a purchaser to pay off an encumbrance on the property sold the failure of the purchaser to do so may give rise to two different causes of action. In the first place, the failure of the purchaser to discharge the encumbrance within such time as is provided expressly or by implication entitles the vendor to bring an action to have himself put in a position to meet the liability which the purchaser has failed to discharge. In such a case, limitation will run under Art. 116 of the Limitation Act (or under Art. 115 if the sale-deed is unregistered) from the date on which the purchaser ought to have paid off the mortgage. In the second place, it is also open to the vendor to bring a suit on the contract of indemnity if as a result of the failure of the purchaser to discharge the encumbrance the vendor incurs a loss. It was contended on behalf of the appellant that there was no express contract of indemnity in the sale-deed executed on 9th February, 1920, in favour of the appellant. But the contract of indemnity is implicit in this case because of the covenant on the part of the purchaser to pay off the previous encumbrance on the property sold. Under s. 124 of the Indian Contract Act "a contract of indemnity" is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. Under Art. 83 of the Limitation Act a suit based upon the contract of indemnity is required to be brought within three years from the time when the plaintiff was actually indemnified. In the present case there is no express contract of indemnity. But, in our opinion, the provisions of Art. 83 are also applicable to a case where the contract of indemnity is implied and not express. It was observed by the Judicial Committee

in *Musammat Izzat-un-Nissa Begam v. Kunwar Pertab Singh* (1) that a contract of indemnity may be express or implied and if the purchaser covenants with the vendor to pay the encumbrances, there is nothing more than a contract of indemnity. At page 208 of the Report the Judicial Committee clearly expressed the proposition as follows:

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"It seems to depend on a very simple rule. On the sale of property subject to incumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the incumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the incumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property. The notion that after the completion of the purchase the purchaser is in some way a trustee for the vendor of the amount by which the existence, or supposed existence, of incumbrances has led to a diminution of the price, and liable, therefore, to account to the vendor for anything that remains of that amount after the incumbrances are satisfied or disposed of, is without foundation. After the purchase is completed, the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase. It would be pedantry to refer at length to authorities. But their Lordships, under the circumstances,

(1) 36 I.A. 203.

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may perhaps be excused for mentioning *Tweddel v. Tweddel* (1), *Butler v. Butler* (2) and *Waring v. Ward* (3)."

This decision was followed by the Full Bench of the Allahabad High Court in *Tilak Ram v. Surat Singh* (4). In our opinion, the principle applies to the present case and we accordingly hold that the covenant undertaken by the predecessor-in-interest of the appellant was not only one to purchase the vendor's property but also one to relieve the vendor from the liability of the mortgage, and in that sense there was an implied contract of indemnity in favour of the vendor. It follows therefore that Art. 83 of the Limitation Act applies to this case and as the sale deed is a registered document the plaintiff has six years for bringing the suit from the time when he is damnified or actually suffers loss. The view that we have expressed is borne out by a long catena of authorities—*Kumar Nath Bhuttacharjee v. Nobo Kumar Bhuttacharjee* (5), *Ratan Bai v. Ghasiram Ganga bisan Wani*, (6). *Harakchand Tarachand v. Sumatilal Chonilal* (7) *Gulabrao Vithoba v. Shamrao Jagoba* (8) *Naima Khatun v. Sardar Basant Singh* (9), *Ram Barai Singh v. Sheodeni Singh* (10), and *Venkatanarayanial v. Subramania Iyer* (11).

It was then contended by Mr. B. C. Misra that even if there was a contract of indemnity the cause of action for the plaintiff arose on 4th February, 1937, when the final mortgage decree was passed and not on 25th February, 1943, when the plaintiff was dispossessed. It was argued that the suit must be held to be brought beyond the period of limitation and the plaintiff was not entitled to succeed. It is not possible for us to accept

(1) (1787) 2 Bro. C.C. 151.

(3) (1802) 7 Ves. 332.

(5) I.L.R. 26 Cal. 241.

(7) 33 Bom. L.R. 1200.

(9) I.L.R. 56 All. 766.

(11) 74 Indian Cases 209.

(2) (1800) 5 Ves. 534.

(4) I.L.R. 1938 All. 500.

(6) I.L.R. 55 Bom. 565.

(8) A.I.R. 1948 Nag. 401.

(10) 16 C. W. N. 1040.

this argument as correct. The vendees, in the present case, covenanted to the vendors not only to purchase the property mentioned in the sale deed but also to relieve the vendors from the liability of the mortgages, and in that sense there was an implied contract to indemnify the vendors. The cause of action in such a case arises when the plaintiff-vendors are actually damaged. The mere fact that a mortgage decree has been obtained against the plaintiff is not sufficient to put the statute in motion. In other words, the statute runs not when the event happens which caused the loss but on the *actual* damnification. "Where the covenant is to indemnify or save harmless, no action can be brought till some loss has arisen; so it is also where the covenant is to acquit from damage by reason of a bond or some particular thing; and in either case the proper plea is *non damnificatus*".—(1 Wms. Saund. 117, no. 1;). In *Collinge v. Hewwood* (1) the plaintiff at the request of the defendant prosecuted an action, on receiving an undertaking to indemnify him from the said distress, actions, costs, damages, and expenses, which are now, or may be hereafter, commenced or otherwise incurred by reason of the claim of the distraining party. The plaintiff incurred costs of the suit and his own attorney thereafter delivered him a bill on account of them. But it was held by the King's Bench that he was not damaged till he had paid the bill. In the present case, the damage occurred to the plaintiffs not on 4th February, 1937, when the final mortgage decree was passed in favour of the mortgagees but on 25th February, 1943, when the Collector directed the execution by the plaintiffs of a self-liquidating mortgage of three-fourths of the half share of the property of which they were the owners. We are therefore of the opinion that, in the present case, time runs under Art. 83 of the Limitation Act from 25th February, 1943, when the plaintiffs were

(1) (1809) 9 A. and E. 683.

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compelled to execute the self-liquidating mortgage for the purpose of satisfying the claim of the mortgagees.

For the reasons expressed we hold that there is no merit in this appeal which is accordingly dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice G. D. Sahgal and Mr. Justice
Lakshmi Prasad*

RAM PAL AND ANOTHER

... APPELLANTS

1967

February, 9

v.

THE JOINT DIRECTOR, CONSOLIDATION,

U. P., LUCKNOW AND OTHERS ... RESPONDENTS

Rhudkasht rights—Acquisition of—Co-heir and co-sharer or co-owner—cultivatory possession of one co-heir is possession for the benefit of all co-heirs—cultivatory possession of one co-owner or co-sharer is possession for himself.

U. P. Tenancy Act, 1939—Explanation 1 of s. 180(1)—applies to the cases of co-owners or co-proprietors and not to the case of co-sharers.

A distinction should be drawn between co-owners and co-heirs. A co-owner taking possession of any plot of land under his own cultivation would have secured *khudkasht* rights for himself and not for other co-sharers in that *khewat*. But the same does not apply when a person dies and his *khudkasht* devolves on his sons who are more than one in number. In that case if one of those sons continues to cultivate that inherited *khudkasht* land, he would be deemed to be doing it for the benefit of all his co-heirs unless he is able to prove a clear case of ouster of other co-heirs. Hence the position of co-heir is different from that of mere co-owner.

The Explanation 1 of s. 180(1) of the U. P. Tenancy Act, 1939 applies to cases of co-owners or co-proprietors and not to co-heirs.

Case-law discussed.

Special Appeal No. 32 of 1966 against the judgment and decree passed by NIGAM, J. dated 19th January, 1967, in W. P. No. 492 of 1963.

Facts appear in the judgment.

Ram Jee, for the appellant.

* While sitting at Lucknow.

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TION, U. P.,
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The following Judgment of the Court was delivered by—

L. PRASAD, J.:—This is a special appeal directed against the judgment of a learned single Judge of this Court dismissing the appellant's petition under Art. 226 of the Constitution.

The appellants are sons of Ram Ratan Singh who filed the writ petition giving rise to this appeal. He died during pendency of the writ petition and the present appellants came by substitution in his place.

Ram Ratan Singh and respondents nos. 5 to 8 are sons of Champat Singh who died leaving *zamindari* property and *sir* and *khudkasht* which are now in dispute. Initially Ram Ratan Singh filed a suit for joint possession over the *sir* and *khudkasht* left by Champat Singh claiming that by virtue of a custom in the family he was entitled to one half share since he was born of one wife, whereas respondents nos. 5 to 8 were born of another one of Champat Singh. That suit went up to second appeal, but it was ultimately dismissed on the ground that instead of filing a suit for joint possession it should have been filed for partition. Thereupon he filed another suit for partition claiming one half share on the same basis. It was decreed by the trial court and that decree was upheld by the first appellate court. When the matter was still pending in second appeal preferred by respondents nos. 5 to 8, the village in question came under consolidation. In an objection filed under section 9 of the U. P. Consolidation of Holdings Act the Consolidation Officer upheld the claim of Ram Ratan Singh. Respondents nos. 5 to 8 went up in appeal. The Settlement Officer (Consolidation) found that the entire *sir* and *khudkasht* plots left by Champat Singh were in exclusive possession of respondents nos. 5 to 8 and accordingly, relying on a decision in *Abhairaj*

Singh v. Ran Bijai Bahadur Singh (1) and explanation 1 of s. 180 of the U. P. Tenancy Act concluded that Ram Ratan Singh can lay no claim to *sir* and *khudkasht* which by virtue of exclusive possession of respondents nos. 5 to 8 must be taken to belong to them exclusively. In this view of the matter Settlement Officer (Consolidation) allowed the appeal of respondents nos. 5 to 8 resulting in the expunction of the name of Ram Ratan Singh. He went in second appeal as also in revision under the provisions of the U. P. Consolidation of Holdings Act but remained unsuccessful. It was thereupon that he instituted a writ petition giving rise to this special appeal.

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We have heard the learned counsel for the appellants. None has appeared for the respondents despite service of notice. The view taken by the learned Single Judge is that even though it may be conceded that the decision of the consolidation authorities sought to be challenged is erroneous, it is not possible to hold that it is manifestly erroneous so as to entitle this Court to interfere with the impugned orders in the exercise of its writ jurisdiction. In this connection he has reproduced a passage from the case of *Ram Kant Singh v. Deputy Director of Consolidation* (2) which reads as follows:

"Possession over proprietary rights did not by itself confer *khudkasht* holder's right. Constructive or presumptive possession is over proprietary rights only. Cultivatory possession is quite different and means actual or physical possession. *Bhumidhari* rights are now derived from *khudkasht* rights; only that co-proprietor who was in cultivatory possession can claim *bhumidhari* rights now. It was never the law that every co-proprietor was to be deemed to be *khudkasht* holder just because one of them himself cultivated the land

(1) 1952 A.W.R. (Rev.) 39.

(2) 1965 R.D. 120.

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and it is not the law that every co-proprietor became *bhumidhar* of the land which did not vest in the Gram Samaj and had not been let to tenants."

Apparently considering that these observations applied to the facts of the case before him the learned single Judge came to the conclusion that the aforesaid view of law taken in that case by a Division Bench of this Court, even if shown to be incorrect, would go to show that the error claimed by the appellants to have been committed by the consolidation authorities is, at any rate, not a manifest error so as to entitle this Court to interfere with their decision in exercise of its writ jurisdiction. We agree that, had the above observations really any application to the facts of the case in hand, then it would not have been possible to take any exception to the view taken by the learned single Judge. We, however, find that the aforesaid observations have no application, whatsoever, to the facts of the case in hand. As is obvious from the observations reproduced above, they apply to the case of co-sharers or co-proprietors. They have no application to the case of co-heirs. A distinction has got to be drawn between co-owners and co-heirs. It is correct that a co-owner taking possession of any plot of land under his own cultivation would have secured *khudkasht* rights for himself and not for other co-sharers in that *khewat*. But the same does not apply when a person dies and his *khudkasht* devolves on his sons who are more than one in number. In that case if one of those sons continues to cultivate that inherited *khudkasht* land, he would be deemed to be doing it for the benefit of all his co-heirs unless he is able to prove a clear case of ouster of other co-heirs. Hence the position of co-heirs is different from that of mere co-owners. We are of opinion that even Explanation 1 of s. 180(1) of the U. P. Tenancy Act has no applica-

tion to the case of co-heirs. That too applies only to the case of co-owners or co-proprietors. Judged in that background, the view taken by the consolidation authorities is not only erroneous but, in our opinion manifestly erroneous so as to justify interference with their decision by this Court in exercise of its writ jurisdiction. In that view of the matter we are of opinion that this special appeal must succeed.

The special appeal is allowed and the order of the learned single Judge dismissing the writ petition is set aside. The writ petition is allowed and the orders passed in second appeal and revision are set aside with the direction that the Deputy Director of Consolidation shall proceed to decide the second appeal afresh according to law in the light of the observations made in this judgment. No order as to costs is made since nobody has appeared to oppose this appeal.

Appeal allowed.

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APPELLATE CIVIL

Before Mr. Justice Jagdish Sahai and Mr. Justice
J. S. Trivedi*

1967

April, 4

SAVITRI DEVI AND OTHERS

... PLAINTIFFS-AP-
PELLANTS

v.

GAURI SHANKER AND OTHERS

... DEFENDANTS-
RESPONDENTS.

Hindu Succession Act, 1956, s. 23—*Applicability of—Daughter's right to enforce partition of dwelling house.*

Where, one *B*, the absolute owner of a dwelling house dies leaving behind him his widow, three sons and four daughters and, later on, one of his sons *S* dies leaving behind him, his widow and two daughters *S* and *K* and the house remained unpartitioned.

Held, the daughters *S* and *K* of the deceased son *S* can claim partition of the dwelling house to the extent of their share as s. 23 of the Hindu Succession Act, 1956, does not apply in the instant case. S. 23 can apply if *S* had left any male heirs. The date on which *B* died is wholly immaterial for the applicability of s. 23, as the question of devolution of the deceased son's share in the house, on his heirs, will not relate back to the death of *B*. It is only in the case of limited owners that the question of devolution has to relate back to the death of the last absolute male owner of the property. After the death of *B*, who was the absolute owner of the house, all his heirs, i.e. his widow, sons and daughters inherited the house and became co-partners and not co-parceners, having an absolute ownership and not limited ownership. It is erroneous to think that the succession on the death of *B* and the succession on the death of *S* were interconnected. On the death of *S* the entire bundle of his rights including right to enforce partition in the house in dispute devolved upon his two daughters i.e. *S* and *K* and his widow.

Second Appeal No. 370 of 1963 against the Judgment and decree, dated 23rd May, 1965 passed by P. S. Shukla, Additional Civil Judge, Faizabad.

Facts appear in the judgment.

B. L. Shukla, for the appellant.

* While sitting at Lucknow.

M. P. Srivastava and Umesh Chandra Srivastava for the Respondent.

The following Judgment of the Court was delivered by:—

JAGDISH SAHAI, J.:—On a reference made by our brother ASTHANA on 25th of August, 1966, this case has come before us for decision.

In order to appreciate the controversy between the parties it is necessary to reproduce the genealogical table of the family:

Sri Bhagoley Halwai=Srimati Pran Dei

Champu Lal	Shiam Lal	Gauri Shankar	Budhan (Daughter)	Sundar (Daughter)	Kaushalya (Daughter)	Chandar (Daughter)
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The property in dispute is a house situate in the city of Faizabad. The house belonged to Bhagoley Halwai. On his death on the 15th of June, 1957, Bhagoley left the sons and daughters mentioned in the genealogical table reproduced above.

Shiam Lal died on the 30th of November, 1958, leaving a widow and two daughters Srimati Savitri Devi and Srimati Kimti Devi both of whom are married. Srimati Savitri Devi and Srimati Kimti Devi filed Suit No. 9 of 1961 in the Court of Munsif, Faizabad for a partition claiming 2/21 share in the house in dispute. The suit was contested, *inter alia*, on the plea that it could not be partitioned because of the provisions of s. 23 of the Hindu Succession Act (hereinafter referred to as the Act). The learned Munsif framed issue no. 2 in respect of this plea. That issue reads:

“Whether the house in suit is not partible as alleged in paragraph 14 of the written statement?”

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He answered the issue in the following words:

"The burden of this issue was on the defendants. They have not adduced any oral or documentary evidence, therefore I decide this issue against the defendants."

The learned Munsif, however, observed later on that he agreed "with the defendants' counsel that in view of the provision contained in s. 23 of the Hindu Succession Act the plaintiffs are not entitled to claim partition unless and until male heirs choose to divide their respective shares." In effect his finding is that though the plaintiffs could claim a partition they could do so only after the male heirs of Bhagoley had chosen to divide their respective shares.

Having found that the learned Munsif dismissed the suit on the 30th of April, 1962. The plaintiffs went in appeal to the District Judge, Faizabad, who transferred it to the Additional Civil Judge of that place. The learned Additional Civil Judge dismissed the appeal holding that it had no force. Thereafter the instant second appeal was filed in this Court. The case came up for hearing before ASTHANA, J. who opined that the question of law raised was an important one and should be decided by a Division Bench. He, therefore, made a reference as already pointed out earlier. This is how the case has come before us.

Learned counsel for the parties are agreed that the house was acquired by Bhagoley Halwai and did not constitute joint Hindu family property owned by himself, his sons and his daughters. That being the position the question that requires consideration is as to whether on his death on the 15th of June, 1957, the devolution of interest took place under the provisions

of s. 6 or s. 8 of the Act. S. 6 so far as it is relevant for our purposes reads:

"6. When a male Hindu dies after the commencement of this Act having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:"

S. 8 of the Act reads:

"8. The property of a male Hindu dying intestate shall devolve according to the provision of this chapter—

(a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;

(b) secondly, if there is no heir of Class I, then upon heirs, being the relatives specified in Class II of the Schedule:

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased."

In the instant case admittedly Bhagooley was the absolute owner of the house in dispute. The house was not coparcenary property. Consequently s. 6 of the Act cannot apply to the facts before us and the case must be governed by s. 8 of the Act. That being the position on the death of Bhagooley the heirs that he left were his widow, his sons and his daughters. There can be no dispute that Shiam Lal was an heir. There can also be no dispute that when the property came into the hands of the heirs of Bhagooley it was not coparcenary property and his various heirs were not coparcenaries but co-partners.

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On the death of Shiam Lal the entire bundle of his rights in the house devolved upon his two daughters and his widow, he having left no male issue. S. 23 of the Act so far as it is relevant for our purposes reads:

"23. Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide the irrespective shares therein but the female heir shall be entitled to right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

Admittedly Shiam Lal was absolute owner of his share in the house. He left no sons. The question, therefore, that requires consideration is whether in the circumstances mentioned above there can be any application of the provisions of s. 23 of the Act to the facts before us. Having carefully perused that provision we are satisfied that it has no application. S. 23 can only apply if Shiam Lal had left male heirs. Sri *Umesh Chandra Srinastava* contends that in order to determine the applicability or otherwise of s. 23 of the Act we must go back to the position as it existed on the death of Bhagoley Halwai. He has however not been able to support his submission either by any statutory provision or by a judicial precedent. It is trite that Shiam Lal was not a limited but an absolute owner. It

is equally elementary that the other heirs left by Bhagoley were absolute owners and not limited owners of their share in the house in dispute. It is only in the case of limited owners that the question of devolution has to relate back to the death of the last absolute male owner of the property. That rule obviously cannot be applied to the facts of the present case because there can be no manner of doubt that succession would open in the instant case on the death of Shiam Lal and not on the death of Bhagoley Halwai. That being the position we have to see as to which heirs did Shiam Lal leave. We, therefore, do not see how s. 23 of the Act can apply to the facts before us. We would like to point out that there is no dispute that Shiam Lal could enforce a partition during his life-time. We have already said that he was a co-partner and not a co-parcener along with the other heirs of Bhagoley Halwai. There cannot be any escape from the conclusion that on the death of Shiam Lal the entire bundle of his rights in the house in dispute devolved upon his two daughters mentioned above and his widow. No principle of law, no statutory provision and no judicial authority has been brought to our notice to the effect that in circumstances like these the entire bundle of rights of Shiam Lal in the house in dispute devolved upon his two daughters and his widow minus the right of partition in the house in dispute. There can be no assumption that on Shiam Lal's death his daughters and his widow inherited the entire bundle of rights of Shiam Lal in the house in dispute minus the right to enforce a partition. Any presumption in favour of such a conclusion would be contrary to well-settled legal principles and all the canons of law of inheritance. In our opinion, therefore, the trial Court as also the first appellate Court were in error in holding that the daughters of Shiam Lal could not maintain Suit No. 9 of 1961.

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The only reason assigned by the learned Munsif for doing so is contained in the following extract from his judgment:

"As it will appear from the plaint succession opened at first place on 15th June 1957 when Bhagoley died leaving behind both male and female heirs and again on 30th November, 1958, succession opened to the extent of the share of Shyam Lal who left behind only female heirs. No doubt succession cannot remain in abeyance and the heirs would be deemed to have inherited their rights on both the dates but for actual partition s. 23 has to be looked into. Without actual partition in the heirs of Bhagoley including Shyam Lal, it is not possible to make actual partition among the heirs of Shyam Lal. So both the successions are almost interconnected from the point of view of actual partition. Consequently it cannot be said that without actually separating the share of Shyam Lal the actual partition among the heirs of Shyam Lal is possible."

The learned Civil Judge's approach to the matter was no better than that of the Munsif. He observed:

"It is commonly admitted to the parties that the house in suit originally belonged to Bhagoley Halwai who was the common ancestor of the parties. It is also commonly admitted to the parties that Bhagoley left behind both, male and female heirs upon his death on 15th June, 1957. Naturally, therefore, the succession amongst the heirs of Bhagoley opened on 15th June, 1957. Till this date the house in suit stands unpartitioned amongst the descendants of Bhagoley Halwai. Consequently there is no specific partition of the house in suit which is opened to physical partition amongst the plaintiffs-appellants as the specific property of their father

Shyam Lal. In the above circumstances the partition in its physical shape will take place amongst all the descendants of Bhagoley who are legally entitled and alive. Since Bhagoley died leaving both male and female heirs and the house in suit is the dwelling house of Bhagoley, which is wholly occupied by the descendants or the members of the family of Bhagoley hence I entirely agree with the learned trial court that s. 23 of the Hindu Succession Act does not hit the plaintiff's present suit and the appeal. Since other male members of the family of Bhagoley Halwai have not joined the present suit for partition; hence under s. 23 of the Hindu Succession Act, the plaintiffs-appellants, who are merely the female descendants of Bhagoley; does not lie."

It is clear from the judgment of the learned Civil Judge that he was not clear in his mind on the question as to on what date would the right in favour of the daughter to succeed arise. The date on which Bhagoley died is wholly immaterial for the decision of the present case and in our opinion the learned Munsif was in error when he thought that the succession on the death of Bhagoley and succession on the death of Shiam Lal were interconnected.

For the reasons mentioned above we set aside the decrees passed by the learned Munsif dated the 30th of April, 1962 and the learned Additional Civil Judge dated the 23rd May, 1963 and decree the suit of the plaintiffs-appellants to the extent of 1/14th in the entire house. The parties will bear their costs in this Court but the plaintiffs-appellants shall receive from the defendants-respondents their costs in the Court of the Munsif as also in the Court of the Additional Civil Judge.

Appeal allowed.

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APPELLATE CIVIL (F. B.)

Before the Hon'ble Mr. Beg, Chief Justice, Mr. Justice Oak, Mr. Justice Dwivedi, Mr. Justice G. Kumar and Mr. Justice G. Prasad.

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BRIJ KUMARI AND ANOTHER ... APPELLANTS
v.

RAJA MOHAMMAD MUSTAFA ALI KHAN
RESPONDENT

U. P. Zamindars' Debt Reduction Act, XV of 1953, s. 2(f) (vi) and Constitution of India, Art. 14.

Sub. cl. (vi) of cl. (f) of s. 2 of the U. P. Zamindars' Debt Reduction Act is invalid being violative of Art. 14 of the Constitution of India.

U. P. Zamindars' Debt Reduction Act, XV of 1953, s. 2(vi) (f)—Portion of the definition invalid—Effect of such invalidity on the Act.

The invalid portion, however, is severable from the valid portion with the result that the definition of 'Debt' contained in the main portion of cl. (f) remains alive so as to make the Act itself enforceable irrespective of the fact that the invalid portion becomes inoperative.

First Appeal No. 456 of 1956 against the judgment and decree of F. B. Shah, Temporary Civil and Sessions Judge, Shahjahanpur, in civil suit No. 5 of 1955 decided on 5th March, 1956.

R. C. Sinha, Vishun Singh and Lalji Sinha, for the Appellant.

The following Judgment of the Court was delivered by:—

BEG, C. J.:—This reference has been made in First Appeal No. 456 of 1956, which was filed by the two appellants, namely Smt. Brij Raj Kumari, widow of Th. Gajendra Shah, and Th. Bikram Shah, son of Th. Gajendra Shah. The respondent in this appeal is Raja Mohammad Mustafa Ali Khan. The suit out of which this appeal arises was filed by Raja Mohammad Mustafa

Ali Khan, as plaintiff against Smt. Brij Raj Kumari and Th. Bikram Shah, as defendants nos. 1 and 2 on the basis of a mortgage-deed dated the 29th of January, 1946. On the date of the execution of the aforesaid deed the estate of the appellants was under the superintendence of the Court of Wards, Shahjahanpur, and the estate of the respondent was under the superintendence of the Court of Wards, Gonda. Accordingly, the mortgagor in the deed of mortgage was the Court of Wards, Shahjahanpur, charged with the superintendence of the estate of Smt. Brij Raj Kumari and Th. Bikram Shah and the mortgagee in the deed was the Court of Wards, Gonda, charged with the superintendence of the estate of Raja Mohammad Mustafa Ali Khan. It is not necessary to specify the terms of the mortgage as they are not relevant for our purpose.

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The present appeal arises out of the suit filed for the enforcement of the aforesaid mortgage by Raja Mohammad Mustafa Ali Khan against Smt. Brij Raj Kumari and Th. Bikram Shah on the 11th of March, 1955. The main pleas taken in this suit on behalf of the defendants were that they were entitled to the benefit of the U. P. Zamindars' Debt Reduction Act, and the provisions of sub-cl. (vi) of cl. (f) of s. 2 of the said Act are invalid, being in conflict with Art. 14 of the Constitution. Issues nos. 2 and 6 framed by the trial court relate to these pleas. They run as follows:

"2. Is the defendant entitled to the benefit of the U. P. Zamindars' Debt Reduction Act? If so, to what benefit?

6. Whether the provisions of sub-cl. (vi) of cl. (f) of s. 2 of the U. P. Zamindars' Debt Reduction Act are invalid being in conflict with Art. 14 of the Constitution? If so, its effect?"

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Beg, C. J.

On the above issues the trial court held that sub-cl. (vi) of cl. (f) of s. 2 of the U. P. Zamindars' Debt Reduction Act was not in conflict with Art. 14 of the Constitution, and that hence the defendants were not entitled to the benefits of the U. P. Zamindars' Debt Reduction Act. The trial court, accordingly, by its judgment, dated the 5th of March, 1956, decreed the plaintiff's suit for Rs.60,000 with the usual provision for *pendente lite* and future interest on the decretal amount at the rate of 4 per cent per annum. There was a further direction that the decretal amount was to be paid within six months; and, in default of payment within the aforesaid period, the realisation of the same was to be made by the sale of the Zamindari abolition compensation bonds of the defendants according to prescribed law in respect thereof. Dissatisfied with the said judgment and decree the defendants have filed the present appeal.

This appeal was initially heard by a Division Bench consisting of OAK and SETH, JJ. The question regarding the invalidity of sub-cl. (vi) of cl. (f) of s. 2 of the U. P. Zamindars' Debt Reduction Act was the main point argued before the said Bench. This question had previously come up for consideration before a Division Bench of this Court in *Nand Ram v. Kishori Raman Singh* (1). In that case it was held by the Division Bench that cl. (f) of s. 2 of the Act was not discriminatory. In view, however, of the decision of the Supreme Court in *State of Rajasthan v. Mukan Chand* (2), the Bench was of opinion that the decision of this Court in *Nand Ram's* case (1) needed reconsideration. It, accordingly, referred the case to a larger Bench. Thereafter the case was fixed before a Bench of three Judges, namely OAK, GYANENDRA KUMAR and SETH, JJ. When the case was heard by them the learned Advocate-General contended that if sub-cl. (vi) of cl. (f) of s. 2 of

(1) A.I.R. 1962 All. 521.

(2) A.I.R. 1964 S.C. 163.

the U. P. Zamindars' Debt Reduction Act was found to be invalid, the effect of it would be to invalidate the entire cl. (f) which contained the definition of the term 'debt'. The learned Judges thought that the questions raised in the case were of sufficient importance to merit decision by a Full Bench of five Judges, and they passed an order to that effect. This case was, accordingly, listed for hearing before us.

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The two questions arising in the case are:

1. Whether sub-cl. (vi) of cl. (f) of s. 2 of the U. P. Zamindars' Debt Reduction Act is invalid, being violative of Art. 14 of the Constitution of India,

2. In case it is found to be invalid, whether the consequence of its invalidity is to make the entire cl. (f), which contains the definition of the term 'debt', void in law, so as to make the Act itself unenforceable?

In order to decide the two aforementioned questions it will be necessary to bear in mind the object and purpose of the piece of legislation in which the impugned provision of law is to be found. The object and purpose of a legislation can be ascertained from the origin, the past history, the title, the preamble and the sections of the Act. The U. P. Zamindars' Debt Reduction Act is a corollary of the U. P. Zamindari Abolition and Land Reforms Act 1950 (U. P. Act No. I of 1951), which was passed for the purpose of implementing the declared policy of the Government to acquire Zamindari properties in order to abolish the intermediaries between the tiller of the soil and the State. On the 8th of August, 1946, the U. P. Assembly passed a resolution accepting in principle the abolition of Zamindari system in the State. In consequence thereof a Committee was

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On the above issues the trial court held that sub-cl. (vi) of cl. (f) of s. 2 of the U. P. Zamindars' Debt Reduction Act was not in conflict with Art. 14 of the Constitution, and that hence the defendants were not entitled to the benefits of the U. P. Zamindars' Debt Reduction Act. The trial court, accordingly, by its judgment, dated the 5th of March, 1956, decreed the plaintiff's suit for Rs.60,000 with the usual provision for *pendente lite* and future interest on the decretal amount at the rate of 4 per cent per annum. There was a further direction that the decretal amount was to be paid within six months; and, in default of payment within the aforesaid period, the realisation of the same was to be made by the sale of the Zamindari abolition compensation bonds of the defendants according to prescribed law in respect thereof. Dissatisfied with the said judgment and decree the defendants have filed the present appeal.

This appeal was initially heard by a Division Bench consisting of OAK and SETH, JJ. The question regarding the invalidity of sub-cl. (vi) of cl. (f) of s. 2 of the U. P. Zamindars' Debt Reduction Act was the main point argued before the said Bench. This question had previously come up for consideration before a Division Bench of this Court in *Nand Ram v. Kishori Raman Singh* (1). In that case it was held by the Division Bench that cl. (f) of s. 2 of the Act was not discriminatory. In view, however, of the decision of the Supreme Court in *State of Rajasthan v. Mukan Chand* (2), the Bench was of opinion that the decision of this Court in *Nand Ram's* case (1) needed reconsideration. It, accordingly, referred the case to a larger Bench. Thereafter the case was fixed before a Bench of three Judges, namely OAK, GYANENDRA KUMAR and SETH, JJ. When the case was heard by them the learned Advocate-General contended that if sub-cl. (vi) of cl. (f) of s. 2 of

(1) A.I.R. 1962 All. 521.

(2) A.I.R. 1964 S.C. 163.

the U. P. Zamindars' Debt Reduction Act was found to be invalid, the effect of it would be to invalidate the entire cl. (f) which contained the definition of the term 'debt'. The learned Judges thought that the questions raised in the case were of sufficient importance to merit decision by a Full Bench of five Judges, and they passed an order to that effect. This case was, accordingly, listed for hearing before us.

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The two questions arising in the case are:

1. Whether sub-cl. (vi) of cl. (f) of s. 2 of the U. P. Zamindars' Debt Reduction Act is invalid, being violative of Art. 14 of the Constitution of India,

2. In case it is found to be invalid, whether the consequence of its invalidity is to make the entire cl. (f), which contains the definition of the term 'debt', void in law, so as to make the Act itself unenforceable?

In order to decide the two aforementioned questions it will be necessary to bear in mind the object and purpose of the piece of legislation in which the impugned provision of law is to be found. The object and purpose of a legislation can be ascertained from the origin, the past history, the title, the preamble and the sections of the Act. The U. P. Zamindars' Debt Reduction Act is a corollary of the U. P. Zamindari Abolition and Land Reforms Act 1950 (U. P. Act No. I of 1951), which was passed for the purpose of implementing the declared policy of the Government to acquire Zamindari properties in order to abolish the intermediaries between the tiller of the soil and the State. On the 8th of August, 1946, the U. P. Assembly passed a resolution accepting in principle the abolition of Zamindari system in the State. In consequence thereof a Committee was

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appointed known as the Zamindari Abolition Committee. This Committee prepared a scheme giving an outline of the land reform proposed to be effected. It submitted its report in October, 1948. On its basis a Bill for the abolition of Zamindari was introduced in the Assembly on the 10th of June, 1949. It was referred to a Joint Select Committee. After considerable deliberations, the Select Committee gave a report which was published in the *Uttar Pradesh Gazette (Extraordinary)*, dated the 29th of December, 1949, and was presented to the Legislature on the 9th of January, 1950. It was finally passed by the Assembly on the 10th of January, 1951, and by the Council on the 16th of January, 1951. It received the assent of the President on the 24th of January, 1951, and was published in the *Uttar Pradesh Gazette (Extraordinary)* on the 26th of January, 1951. The notification under s. 4 of the Act for vesting of estates in Uttar Pradesh as a whole (with some exceptions) was published on the 1st of July, 1952. The object of the U. P. Zamindari Abolition and Land Reforms Act, as stated in its preamble, was "to provide for the abolition of the Zamindari system which involves intermediaries between the tiller of the soil and the State in Uttar Pradesh and for the acquisition of their rights, title and interest, and to reform the law relating to land tenure consequent upon such abolition and acquisition and to make provision for other matters connected therewith". The statement of objects and reasons of the U. P. Zamindari Abolition and Land Reforms Act published in the *Uttar Pradesh Gazette (Extraordinary)*, dated 10th June, 1949, recited that the question of scaling down the debts of the intermediaries, whose rights were to be acquired, would be dealt with by a separate Bill. The U. P. Zamindars' Debt Reduction Act may be said to constitute a fulfilment of the said promise.

It would thus appear that the U. P. Zamindars' Debt Reduction Act was a consequence of the U. P. Zamindari Abolition and Land Reforms Act. The statement of objects and reasons of the U. P. Zamindars' Debt Reduction Act itself refers to the fact that the Zamindari Abolition Committee had made recommendation as regards the scaling down of the intermediaries' debts, and had further pointed out that the existing debt laws did not take into account the special problem of the reduced capacity of the landlord to pay his debts as a result of the abolition of Zamindari. It then goes on to state that the said Committee had further observed that it appeared sound and equitable that, after the abolition of the Zamindari, the landlord's debts should be reduced in proportion to the reduction in the value of his land consequent upon the abolition of the Zamindari, and that, in order to implement the recommendations of the said Committee in this regard, the Bill, which formed the basis of the U. P. Zamindars' Debt Reduction Act, 1950, was presented before the Legislature. The U. P. Zamindars' Debt Reduction Act (U. P. Act No. XV of 1953) received the assent of the President on the 21st of May, 1953, and the English translation of the Act was published in the *U. P. Gazette (Extraordinary)* dated the 25th of May, 1953. The object of the Act, as its preamble itself indicates, is "to provide for scaling down debts of Zamindars whose estates have been acquired under the provisions of the U. P. Zamindari Abolition and Land Reforms Act, 1950". This Act contains eleven sections. S. 1 of the Act gives its short title and states that "this Act may be called the Uttar Pradesh Zamindars' Debt Reduction Act, 1952". The short title itself succinctly brings out the purpose of the Act as being the reduction of the debts of Uttar Pradesh Zamindars. The definition of the term "debt" is contained in s. 2(f) of the Act. In conformity with its pur-

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pose it excludes debts incurred after 1st July, 1952, from the benefit of the Act. It is noteworthy that 1st July, 1952, was the date of vesting under s. 4 of the U. P. Zamindari Abolition and Land Reforms Act, 1950. S. 3 of the Act invests the Court with the power to reduce the debts at the time of passing the decree. S. 4 of the Act empowers the Court to reduce debts after passing the decree. S. 5 lays down that "for purposes of ss. 3 and 4 every mortgagor or judgment-debtor entitled to the estate as stated therein shall be treated as separate unit" with the modification contained in the proviso appended thereto. S. 6, provides for the passing of a decree by the Court after the amount has been reduced under s. 3. S. 7 lays down that "after the amount due has been reduced under and in accordance with the provisions of s. 4, the decree shall, to the extent of the reduction so effected, be deemed for all purposes and on all occasions to have been duly satisfied". S. 8 provides that notwithstanding anything contained in any agreement, document or law for the time being in force, a decree relating to a secured debt shall, in so far as the compensation for the mortgaged estate is concerned, be executed to the extent of three-fourth amount only against the compensation and rehabilitation grant payable to such mortgagor or debtor in respect of his estate. S. 9 lays down that the Court executing a decree other than a secured debt against the compensation or rehabilitation grant shall enter satisfaction in accordance with the formula given in Schedule II. S. 10 provides for the extension of the principles of reduction provided in the Act to cases of arrears of Guzara or maintenance. S. 11, which is the last one, relates to the making of rules by the Government for purposes of carrying into effect the provisions of the Act. Schedule I provides the formula for the reduction of debts referred to in ss. 3 and 4 of the Act. The above discussion makes it

quite clear that the sole purpose of the entire Act was to scale down the debts of the Uttar Pradesh Zamindars, whose capacity to repay their debts was debilitated by the acquisition of their estates under the U. P. Zamin-dari Abolition and Land Reforms Act. The U. P. Zamindars' Debt Reduction Act is a remedial piece of legislation embodying a scheme for giving effect to the object of the Act, namely the reduction of the Zamin-dars' debts.

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If the above object and the scheme is borne in mind, then there should be no difficulty in providing an answer to both the two aforementioned questions that have arisen for consideration in this reference. So far as the first question is concerned, it is not necessary to discuss it in detail, as the answer to it is provided by the judgment of the Supreme Court in the *State of Rajasthan v. Mukan Chand* (1). This was an appeal against the judgment of the Rajasthan High Court in a case in which the validity of s. 2(e) of the Rajasthan Jagirdars' Debt Reduction Act (Rajasthan Act No. IX of 1957) had come up for consideration before it. S. 2(e) of the Rajasthan Jagirdars' Debt Deduction Act is quoted in the judgment and reads as follows:

"2(e) 'Debt' means an advance in cash or kind and includes any transaction which is in substance a debt but does not include an advance as afore-said made on or after the first day of January, 1949, or a debt due to—

(i) the Central Government or Government of any State;

(ii) a Local Authority;

(iii) a Scheduled Bank;

(iv) a Co-operative Society;

(1) A.I.R. 1964 S. C. 1633.

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(v) a waqf, trust or endowment for a charitable or religious purpose only; or

(vi) a person, where the debt was advanced on his behalf by the Court of Wards."

The definition of debt given in the Rajasthan Jagirdars' Debt Reduction Act follows closely the pattern of the definition of debt given in s. 2(f) of the U. P. Zamindars' Debt Reduction Act, 1952, which runs as under:

"2(f) 'Debt' means an advance in cash or in kind and includes any transaction which is in substance a debt but does not include an advance as aforesaid made on or after the first day of July, 1952 or a debt due to—

(i) the Central Government or Government of any State;

(ii) a local authority;

(iii) a scheduled bank;

(iv) a co-operative society;

(v) a waqf, trust or endowment for a charitable or religious purpose only; and

(vi) a person, where the debt was advanced on his behalf by the Court of Wards to a ward."

The Rajasthan High Court had held that the exemptions contained in the definition of debt in s. 2(e) of the Rajasthan Act, being discriminatory, were hit by Art. 14 of the Constitution. The Supreme Court upheld the view taken by the Rajasthan High Court on this aspect of the case. The relevant passage in the judgment of the Supreme Court runs as follows:

"We think that the High Court was right in holding that the impugned part of s. 2(e) infringes Art. 14 of the Constitution. It is now well settled that in order to pass the test of permissible classi-

fication, two conditions must be fulfilled, namely (1) that the classification must be founded on an intelligible differentiation which distinguishes persons or things that are to be put together from others left out of the group, and (2) that the differentia must have a rational relationship to the object sought to be achieved by the statute in question. In our opinion, condition no. 2 above has clearly not been satisfied in this case. The object sought to be achieved by the impugned Act was to reduce the debts secured on jagir lands which had been resumed under the provisions of the Rajasthan Land Reforms and Resumption of Jagirs Act. The Jagirdar's capacity to pay debts had been reduced by the resumption of his lands and the object of the Act was to ameliorate his condition. The fact that the debts are owed to a government or local authority or other bodies mentioned in the impugned part of s. 2(e) has no rational relationship with the object sought to be achieved by the Act. Further, no intelligible principle underlies the exempted categories of debts. The reason why a debt advanced on behalf of a person by the Court of Wards is clubbed with a debt due to a State or a scheduled bank and why a debt due to a non-scheduled bank is not excluded from the purview of the Act is not discernible."

The above reasoning would apply with full force to the provision of law impugned in the present case. Reliance before the Supreme Court was placed by the counsel for the appellant on the case of *Nand Ram v. Kishori Raman Singh* (1) in support of his contention to the contrary. The Supreme Court did not approve of the line of reasoning adopted by the Allahabad High Court in *Nand Ram's case* (1). So far as this question,

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therefore, is concerned, it stands concluded by the decision of the Supreme Court in the aforementioned case. It must, therefore, be held that sub-cl. (vi) of cl. (f) of s. 2 of the Act is void being violative of Art. 14 of the Constitution of India.

In this situation the argument that was vehemently pressed before us by the learned Advocate General was that assuming sub-cl. (vi) of cl. (f) of s. 2 to be void in law as being discriminatory, the necessary consequence of such a view would be to invalidate the entire definition of debt as contained in cl. (f) of s. 2 thereby making the Act itself unenforceable. We have heard the learned Advocate General at length on this point, but we find it difficult to accept his contention in this regard. Where a portion of an Act is held to be invalid by a Court, it does not necessarily have the effect of invalidating the remaining portion or portions of the Act which may be otherwise valid. The answer to the question as to what its effect on the rest of the Act would be, depends on the answer to the further question as to whether the excluded portion is severable from the remaining portion. The principles governing the doctrine of severability involve multifarious considerations. These principles are enumerated in detail by the Supreme Court in the case of *R. M. D. Chamarbaugwalla v. Union of India* (1). In this case ss. 4 and 5 of the Prize Competitions Act (No. 42 of 1955) and rr. 11 and 12 made thereunder were impugned by the petitioners as unconstitutional. The object of the Act, as stated in its preamble and short title, was "to provide for the control and regulation of prize competitions". S. 2(d) of the Act defined 'prize competition' as meaning "any compensation (whether called a cross-words prize competition, a missing-word prize competition, a picture prize competition or by any other name), in which prizes

(1) A.I.R. 1957 S. C. 628.

are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation of letters, words or figures". Ss. 4 and 5 of the said Act made the promotion or conduct or prize competitions penal except under restrictions and conditions prescribed therein. Rr. 11 and 12 laid down requirements regarding the charge of entry, fees and the maintenance of registers by persons holding such competitions. The Court, after discussing the origin and history of the legislation, and, bearing in mind its object as stated in the preamble and short title, came to the conclusion that the intention of the legislature in enacting the Prize Competitions Act was to control and regulate only competitions of a gambling nature and not competitions depending to any substantial degree on skill. Hence, the definition of prize competition as given in s. 2(d) of the Act should be construed as embracing transactions of the former nature only. In the alternative the Court held that assuming that the definition of the expression "prize competition" in the Act is interpreted to include not only transactions of a gambling nature (that is wagering transactions) but also transactions involving skill (that is commercial transactions) the two kinds of transactions form separate and distinct categories. After the true character of a transaction is determined, it must fall under either the one or the other. After adverting to this aspect of the matter the Court made the following significant observations:

"And if we are now to ask ourselves the question would Parliament have enacted the law in question if it had known that it would fail as regards competitions involving skill, there can be no doubt, having regard to the history of the legislation, as to what our answer would be. Nor does the restriction of the impugned provisions to competitions of a gambling character affect either the texture or the

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colour of the Act; nor do the provisions require to be touched and rewritten before they could be applied to them. They will squarely apply to them on their own terms and in their true spirit, and form a code complete in themselves with reference to the subject. The conclusion is therefore inescapable that the impugned provisions, assuming that they apply by virtue of the definition in s. 2(d) to all kinds of competitions, are severable in their application to competitions in which success does not depend to any substantial extent on skill."

The present case is obviously much stronger. In the case before the Supreme Court the definition clause itself did not expressly create separate categories of transactions so as to make one severable from the other. Severability was a conclusion which was drawn from the past history and object of the Act. In other words, the doctrine of severability was applied by the Supreme Court in this case on the ground that it was implicit in the definition, and followed from the purpose of the Act. In the present case, on the other hand, severability is explicit, as it is created expressly in the definition clause itself, in words which admit of no doubt. To put it in other words, in the present case severability is writ large on the face of the relevant provision of law. The difficulty that could have arisen in the case before the Supreme Court does not and cannot, therefore, arise in the present case. This aspect of the matter may be further clarified by a reference to the case of *State of Bombay v. F. N. Balsara* (1). In this case separate categories were created explicitly, as a result of the definition contained in the Act and the notification issued thereunder. Referring to *Balsara's case* (1) the judgment of the Supreme Court in the case under discussion made the following significant observations:

(1) A.I.R. 1951 S. C. 318.

"In *Balsara's* case (1), the question was as to the validity of the Bombay Prohibition Act. Ss. 12 and 13 of the Act imposed restrictions on the possession, consumption and sale of liquor, which had been defined in s. 2(24) of the Act as including '(a) spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol, and (b) any other intoxicating substance which the Provincial Government may, by notification in the Official Gazette, declare to be liquor for the purpose of this Act.' Certain medicinal and toilet preparations had been declared liquor by notification issued by the Government under s. 2(24)(b). The Act was attacked in its entirety as violative of the rights protected by Art. 19(1)(f); but this Court held that the impugned provisions were unreasonable and therefore void, in so far as medicinal and toilet preparations were concerned but valid as to the rest. Then, the contention was raised that 'as the law purports to authorise the imposition of a restriction on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable.' In rejecting this contention, the Court observed at pp. 717-718 (of S. C. R.): (at p. 328 of A. I. R.):

'These items being thus treated separately by the Legislature itself and being severable, and it not being contended, in view of the directive principles of State policy regarding prohibition, that the restrictions imposed upon the right to possess or sell or buy or consume or use those categories of properties are unreasonable,

(1) 1951 S.C.R. 682: A.I.R. 1951 S.C. 318.

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the impugned sections must be held valid so far as these categories are concerned.'

This decision is clear authority that the principle of severability is applicable even when the partial invalidity of the Act arises by reason of its contravention of constitutional limitations. It is argued for the petitioners that in that case the legislature had through the rules framed under the statute classified medicinal and toilet preparations as a separate category, and had thus evinced an intention to treat them as severable, that no similar classification had been made in the present Act, and that therefore the decision in question does not help the respondent. But this is to take too narrow a view of the decision. The doctrine of severability rests, as will presently be shown, on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that, that intention is to be ascertained from the terms of the statute. It is the true nature of the subject-matter of the legislation that is the determining factor, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it."

According to the above observations the doctrine of severability is based on wider considerations, resting as it does, on the presumed intention of the legislature. As there was no express division or classification made in the statute impugned in *Chamarbaugwalla's* case (1) the doctrine of presumed intention of severability had to be invoked by the Supreme Court in support of the plea of severability. In the present case there being a clear-cut and separate classification made in the statute

(1) 1957 S.C.R. 628.

itself, the intent of severability is deducible directly from the method adopted by the legislature in the statute itself, and is not the result of any presumption made from the object of the statute as deduced from its past history. The present case is therefore, stronger than *Chamarbaugwalla's* case (1) in this regard. The present case is also stronger than *Balsara's* case (2), because whereas in *Balsara's* case (2) separate classification was the result of a notification issued by the Government under the provisions of the definition clause, in the present case separate classification is not the result of any notification issued by the Government under the power given to it under the statute but is created in the body of the statute itself. In other words, whereas in *Balsara's* case (2) the separate classification was created indirectly, in the present case it is created directly by the legislature itself.

Where a severable classification is made directly and expressly in the statute itself, as in the present case, there should be no difficulty at all in holding that the intention of the legislature was to treat the two portions as severable. The intention of the legislature in the present case is, therefore, manifest and admits of no doubt.

The judgment in *Chamarbaugwalla's* case (1) lays down seven principles that govern the doctrine of severability. They are summarised in the judgment. They may now be taken up separately and discussed in relation to the impugned provision of the U. P. Zamindars' Debt Reduction Act. The first principle enunciated therein is as follows:

"1. In determining whether the valid parts of statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid.

(1) 1951 S. C. R. 682: A.I.R. 1951 (2) A.I.R. 1951 S.C. 318.

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Vide Corpus Juris Secundum, Vol. 82, p. 156;
Sutherland on Statutory Construction, Vol. 2, pp.
176-177."

In enacting the U. P. Zamindars' Debt Reduction Act the intention of the legislature, as shown above, was to benefit the debtor-zamindar, who had been deprived of his property by the State, and not the creditor. The purpose of sub-cl. (vi) of cl. (f) of s. 2 is to exempt a particular class of creditor, namely a creditor who happens to be a ward of the Court of Wards when the debt was advanced on his behalf to another person who was himself a ward under the Court of Wards Act. The number of such creditors—we can safely tell from our experience in this State—can be counted on the finger tips. On the one side is the tiny group of "preferred" creditors, on the other side is the huge multitude of zamindar debtors. Having regard to the history and predominant object of the Act, we think that it is a safe inference to draw that the legislature would have preferred to retain the valid portion of the Act, even though the portion protecting the 'preferred' creditors was found to be invalid. The Act was not designed for the benefit of the creditors, and it is not possible to say that the State would not have enacted this legislation if the creditors, who happened to fall under aforesaid category, had not been exempted from its operation. In fact, as would appear from the judgment of the Supreme Court, the conferment of this benefit on the Court of Wards creditor, is extraneous to the purpose of the Act and has no rational nexus with the object of the statute.

The second principle laid down in this case is as follows:

"2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion

must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide *Cooley's Constitutional Limitations*, Vol. 1 at pp. 360-361; Crawford on *Statutory Construction*, pp. 217-218."

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As observed above, in the present case the definition clause itself has created separate categories, with the result that the valid and invalid portions are, on the face of them, separable from each other. The definition of debt as contained in the main portion is quite distinct and separable and is capable of being worked out independently of the portion which is invalid and unenforceable.

The third principle laid down is as follows:

"3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. Vide Crawford on *Statutory Construction*, pp. 218-219."

The entire scheme, as appearing from the body of the Act, has been discussed above. The scheme is a carefully devised and elaborate one. Its foundation has been laid in the preamble and the structure has been built up in the body of the Act. The details of this scheme have been worked out in ss. 3 to 10, and are referred to above. The purpose of all these sections is to afford relief to the debtors. The same is the purpose of the two Schedules appended to the Act. Sub-cl. (vi) of cl. (f) of s. 2 is for the benefit of a certain class of creditors. This exemption is, in a way, foreign to the scheme worked

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out in the body of the Act. It is more in the nature of an excrescence in the Act rather than an integral part of it. The impugned portion is in disharmony with the object of the Act, and is not in consonance with the scheme promulgated in the body of the Act. In fact, it is in conflict with it. Its presence introduces a disturbing element in the scheme and retards its smooth working. Verily, the scheme of the Act is capable of being operated more effectively if the impugned portion is cut out of the definition clause. If, on the other hand, it is treated as inseparable from the rest of the definition clause, then the entire scheme collapses, for the definition of the debt contained in s. 2(f) forms the foundation of the entire Act. Its inseparability will be destructive of the entire scheme. It may also be noted in this connection that the acceptance of the view which is contended for by the Advocate General will result in nullifying thousands of decrees and orders which must have been passed by Courts since 1953 on the basis of the U. P. Zamindars' Debt Reduction Act.

The fourth principle laid down is as follows:

"4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of the scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety."

It may be noted that the impugned portion constitutes a mere exemption. Its elimination leaves the definition of debt, as contained in the opening part of the clause, which is its main or governing portion, untouched and unimpaired. The opening portion constitutes the general clause. It defines debt in terms of widest amplitude. After the elimination of the impugned por-

tion, the portion left is not thin or truncated, but substantial and real. In fact, its elimination has the effect of further widening the scope of the main portion by extending the area of its application, thereby making it firmer, stronger and more substantial. The scheme that emerges as a result of its elimination is, a scheme which is not substantially different from that intended by the legislature but is, in fact, more in harmony with it.

The fifth principles is laid down as follows:

"5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different section; (*Vide Cooley's Constitutional Limitations*, Vol. 1, pp. 361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein."

The question arising out of this principle also must, in the context of what has already been said, be answered in favour of the appellants. In view of the above principle, it cannot be argued with any degree of force that because the valid and the invalid portions are contained in the same section, therefore, they are incapable of being separated. The substance of the matter is contained in the general clause which is valid. The impugned portion is contained in the portion relating to exemptions, and is immaterial. Further, the impugned portion is not material so far as the object of the Act is concerned.

The sixth principle is laid down as follows:

"6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void,

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as otherwise it will amount to judicial legislation. Vide Sutherland on *Statutory Construction*, Vol. 2, p. 194."

In the present case after eliminating the impugned portion no alteration or modification is needed to enforce the Act. The result would be that the general clause would be capable of being worked out without the exceptions. This would be the automatic result of striking down the exemptions, and not the result of any legislative action on the part of the Court. After eliminating the impugned portion, there would remain a self-working Act capable of operating in a smooth and undisturbed fashion and subserving the salutary purpose for which it was framed.

The seventh principle is laid down in the following words:

"7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide Sutherland on *Statutory Construction*, Vol. 2, pp. 177-178."

The history of the legislation, the object of the statute, the title and the preamble of the statute, all point to the conclusion that the exempted portion is an extraneous element in the Act. In fact, as observed above, the Supreme Court has held that there is no nexus between the provision relating to exemption and the object of the Act as indicated by the history of the legislation, its title and its preamble. Under the circumstances, this principle also would support the contention advanced on behalf of the appellants.

The result of the application of the aforementioned seven principles, enumerated by the Supreme Court, to the present case may now be summarised in the follow-

ing seven conclusions given in the respective order of their statement as above:

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1. The dominant intention of the legislature was to afford relief to the debtors who were zamindars. The exemptions are aimed not at giving relief to the debtors but to certain types of creditors. It cannot, therefore, be said that the legislature would not have enacted the U. P. Zamindars' Debt Reduction Act had the exemptions in favour of those creditors not been introduced therein.

2. The separation of categories having been made by the legislature in the relevant clause of the statute itself, the valid and the invalid portions are clearly severable in the present case.

3. The remaining portion, which is valid, forms part of the scheme designed by the legislature to afford relief to the zamindar-debtors. On the other hand the exemptions in favour of certain class of creditors are subsidiary matters, and do not form part of the integrated scheme.

4. What is left after omitting the exemptions is substantial and real. It is in consonance with the object of the Act, and advances the purpose sought to be achieved by it.

5. An examination of the provisions of the Act as a whole also leads to the same conclusion.

6. The valid portion left after excluding the invalid portion is capable of being worked out effectively and smoothly without making any real modification or alteration in the Act. In other words, as a result of its elimination, the working of the Act does not involve any legislation on the part of the Court.

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7. A reference to the history, the object, the title and the preamble of the Act also fortifies the conclusion that the exemption contained in sub-cl. (vi) of cl. (f) of s. 2 relates to a minor matter, and its exclusion from the Act cannot be utilised for the purpose of defeating the major intent of the legislature.

The seven principles laid down by the Supreme Court in the above case appear to be exhaustive of the tests that can be applied in a case where the doctrine of severability is invoked. Thus all the seven principles enumerated above would support the appellants contention. The irresistible conclusion, therefore, is that the valid and the invalid portions are severable in the present case and the invalidity of the impugned portion has no effect on the validity of the remaining portion.

Learned Advocate-General, on the other hand, vehemently argued that in the present case the valid and the invalid portion are not severable, with the result that the entire definition of "debt" contained in s. 2(f) of the Act would have to be deleted thereby making the entire Act unenforceable. In support of his contention the learned Advocate-General strongly relied on the principle laid down in the Full Bench case of *Bhai Singh v. The State* (1). This Full Bench case overruled the view taken in a previous Division Bench case of this Court in *Mehar Chand v. State* (2). In both these cases the question of the validity of s. 29 of the Indian Arms Act (Act No. XXI of 1878) came up for decision before this Court. In the Division Bench case of *Mehar Chand* (2) the validity of s. 29 of the Indian Arms Act was assailed by the applicants in revision. The applicants were convicted and sentenced under s. 19(f) of the Arms Act. S. 29 of the said Act divided criminal cases arising out of prosecution of persons under s. 19(f) of the

(1) 1960 A.L.J. 68.

(2) A.I.R. 1959 All. 660.

Arms Act into two categories. The first category consisted of cases in which the offence was committed in an area situate to the north of the Ganges. The second category consisted of cases in which the offence was committed in any part of India excluding the area situate to the north of the Ganges. The situation on the date of the coming into force of the Constitution of India was that under s. 29 of the Arms Act no sanction was required to prosecute persons whose cases fell within the first category but, on the other hand, sanction was required for prosecution of persons whose cases fell within the second category. The case of the accused persons, who were applicants in the revision application before the Division Bench, fell within the first category. Under the law, therefore, no sanction was required for their prosecution, and they were prosecuted without any sanction. On behalf of the applicants it was argued that s. 29 of the Arms Act being discriminatory, it contravened Art. 14 of the Constitution of India, with the result that the prosecution of the accused persons without sanction was bad in law. This argument was accepted by the Division Bench. The relevant passage in the judgment of the Division Bench is as follows:

"The discrimination made in s. 29 of the Arms Act between two classes of offenders therefore contravenes Art. 14 of the Constitution. The protection of prior sanction, if it was to be available at all, must have been available, at least after the coming into force of the Constitution to all persons without any distinction on territorial basis. That part of s. 29 therefore which debars one part of the State from claiming the advantage must consequently be held to have become void after the enforcement of the Constitution under Art. 13 of it.

Irrespective of the area in which Mehar Chand and Sarupa committed the offences which they were

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alleged to have committed, they could not have been prosecuted without prior sanction being taken, and if no sanction was obtained in their cases their prosecution stood vitiated."

Under s. 29 of the Act, as observed above, no sanction at all was needed for the prosecution of persons falling under the first category. The case of the applicants admittedly fell under the first category. The Division Bench, however, held that because the protection of the sanction was available to persons who fell within the second category, the same protection should be available to persons who fell within the first category. The view taken by the Division Bench obviously involved alteration or modification of law. According to law no sanction was needed for the prosecution of the accused persons whose case fell in the first category. On the other hand, according to the view taken by the Division Bench, sanction became necessary for their prosecution. This view clearly amounted to an alteration of the law. In fact, it was contrary to the provisions of s. 29 of the Arms Act according to which no sanction was needed at all for the prosecution of an offender whose case fell under the first category. Owing to the above error in the judgment of the Division Bench the view taken by it needed to be referred to a larger Bench for a reconsideration of the same. This was done in the Full Bench case of *Bhai Singh v. The State* (1). In this case the Full Bench upheld the view of the Division Bench that the classification in s. 29 of the Arms Act was unreasonable, but reversed its view that sanction was necessary for the prosecution of persons falling under the first category. The relevant passage of the judgment of the Full Bench runs as follows:

"It was clearly the intention of the Legislature that sanction for a prosecution under s. 19, cl. (f),

(1) 1960 A.L.J. 68.

should not be necessary in certain areas in the present case, north of the Ganga. The Court has held that the classification made by s. 29 is unreasonable, and that, in our opinion, is as far as it can go. The necessary consequence of holding the classification to be unreasonable is that s. 29 is unconstitutional and therefore invalid. It is, we think for the Legislature then to decide what course it shall adopt. The Court in *Mehar Cand's* case (1) in declaring sanction to be necessary in all cases of a prosecution under s. 19, cl. (f), has in our opinion, *altered the law and thereby encroached on the legislative power.*"

The words "altered the law and thereby encroached on the legislative power" have been italicized in the above passage by me with a view to bring out the distinction between the case relied on and the present one. The alteration or modification of law in this fashion was clearly a contravention of the sixth principle laid down by the Supreme Court in the case of *R. M. P. Chamarbaugwalla v. Union of India* (2) discussed above. According to this principle, which has been reproduced above, if the enforcement of the Act, after deleting the invalid portion, results in alteration or modification of the law, the whole of it has to be rejected. In the present case the elimination of sub-cl. (vi) of cl. (f) of s. 2 of the Act does not result in alteration or modification of the law at all. On the other hand, it facilitates the smooth working of the law as laid down in the main definition of "debt". The argument of the learned Advocate-General seems to ignore the fact that in the provision of law arising for consideration in the present case there is a general clause containing the definition of the term "debt", and the invalid portion has come in only by way of exception to the general clause. If the exception is

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(1) A.I.R. 1959 All. 640.

(2) A.I.R. 1957 S. C. 628.

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cut out, the result is that the general clause would have full operation unrestricted by the exemption created by the invalid portion. The exclusion of the invalid portion, therefore, far from obstructing the working of the general clause promotes, advances and subserves its smooth operation. This distinction can be emphasised from another angle as well. In the case before us there is a general definition of "debt" given in the main clause which covers the entire area. The subsequent portion of the definition, however, exempts certain areas which would otherwise be covered by the general clause and included in it. Their exclusion, therefore, only results in the general clause covering the area which, but for the exclusion, was already covered by it. In other words, in the case before us there is a general clause and a sub-clause. On the other hand, in the Full Bench case cited, this situation did not arise. In the Full Bench case there were two completely separate classes. They were mutually exclusive of each other. The elimination of one, therefore, necessarily resulted in the elimination of the other. It was not a case of a sub-clause within a class, but a case of two independent classes the existence of either of which was destructive of the other. That is not the situation in the case before us. In the present case the main portion has nexus with the object of the statute and is valid for that reason, but the portion relating to exemption has no nexus with the object of the statute and is invalid for that reason. The main portion being general, with the disappearance of the subsidiary portion, the latter merges in the former which therefore remains fully workable. The Full Bench case of this Court relied on by the learned Advocate-General, therefore, being clearly distinguishable, cannot be pressed into service in support of his argument.

The next argument advanced by the learned Advocate-General was that where a provision of law in a piece

of legislation is found to be discriminatory, it is invariably impossible to separate the valid and the invalid portion of the said legislation, because the mental process involved in discrimination is a single and an indivisible one. This argument also appears to be open to a number of criticisms. In the first place, in a case like the present, where one portion is found to be valid or good and the other invalid or bad, it cannot be said that the mental process is a single and indivisible one. The valid portion, which is contained in the main clause, is a general one. It grants relief to the debtors. On the other hand, the exceptions that follow deny relief to the debtors. The valid portion advances the object of the Act, whereas the invalid portion frustrates the same. The former process which subserves the purpose of the Act can be described as a forward process. The latter process which foils the purpose of the Act can, from this point of view, be described as a backward process. One is the converse of the other. From this point of view it cannot be said that the two constitute a single process or even an analogous process. In any case, in determining the validity of a provision of law under Art. 14 of the Constitution of India, the Court is concerned not so much with the mental process involved in the discriminatory provision as with the consequences following therefrom. The former is a psychological and subjective aspect, whereas the latter is a legal and objective aspect of the matter. The real intent of the legislature is to be discovered from the language and scheme of the Act.

As a corollary to the above contention the learned Advocate-General further urged that in no case in which a provision of law is held to be discriminatory can there be severance between the valid and the invalid portion. This argument is a natural consequence of the earlier argument according to which the mental process involved in the act of discrimination is a single and indivisible

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one. The answer to this argument has already been given above. Further, this argument is repelled by a number of cases in which Courts have applied the doctrine of severability even though the invalidity of the impugned provision in those cases was the result of discrimination. An instance of it is readily available in the case of *Mukan Chand v. Rao Raja Inder Singh* (1). It should be noted that this is the very case, which went up in appeal before the Supreme Court, and the judgment in which is reported in the *State of Rajasthan v. Mukan Chand* (2). In the High Court the judgment in this case was delivered by a Division Bench consisting of K. L. BAPNA, Acting C. J. and JAGAT NARAIN, J. The judgment of the Division Bench of the High Court did advert to this aspect of the matter. The following observations in the said judgment are relevant to the point:

"We are accordingly of the opinion that the exemptions contained in the definition of 'debt' are discriminatory and are hit by Art. 14 of the constitution. These exemptions are however severable from the remaining provisions of the Act. We, accordingly, hold that the following portion out of the definition of debt contained in the impugned Act is void:—

'or a debt due to—

- (i) the Central Government of any State;
- (ii) a local authority;
- (iii) a scheduled bank;
- (iv) a co-operative society; and
- (v) a waqf, trust or endowment for a charitable purpose only; or
- (vi) a person, where the debt was advanced on his behalf by the Court of Wards."

(1) I.L.R. 9 Raj. 547. (2) A.I.R. 1964 S. C. 1688.

In appeal the Supreme Court upheld the view of the High Court that the exemptions in the above provision of law being discriminatory are bad. No doubt, in its judgment, the Supreme Court did not advert to this aspect of the matter. This might have been due to the fact that the judgment of the Supreme Court was given in the appeal of the State in which the question of severability was not material. The question could only have arisen in the appeal by the creditor, but the said appeal had abated.

Another instance that would militate against the contention advanced by the learned Advocate-General is to be found in the Division Bench judgment of the High Court of Allahabad in the case of *Firm Jaswant Rai Jai Narain v. Sales Tax Officer* (1). In this case the proviso to s. 3 of the U. P. Sales Tax Act (Act No. 15 of 1948) was challenged as *ultra vires* the Constitution. S. 3 was the charging section of the Sales Tax Act. The main portion of the section laid down the general rule that every dealer would be liable to pay sales tax at a certain rate. This was followed by a proviso according to which the Provincial Government was empowered to issue a notification in the official Gazette reducing the rate of tax payable by a dealer or a class of dealers. The result of the issue of such a notification was to create in favour of such a dealer or class of dealers an exemption from tax payable under the general clause. The proviso was challenged as invalid being discriminatory and, therefore, hit by Art. 14 of the Constitution. Dealing with this question the Court observed as follows:

"It may be noted at the outset that the Sales Tax Act is a piece of legislation intended primarily for the raising of revenue for the State. It is an Act which charges certain persons with the liability for the payment of tax upon sales of certain goods.

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The charging provisions are general. Every person who falls within the definition of a 'dealer' is liable to pay the tax under certain conditions. This general provision is followed up by a number of exceptions.

These exceptions are in the nature of affording relief to certain dealers or class of dealers or in respect of the sale of certain goods or class of goods. It is in the light of these facts that we have to consider whether the provisions relating to the exemptions, which are challenged as creating unreasonable discrimination, can be separated from the general provisions of the Act.

The principles, upon which the severability of an impugned provision of an Act is judged are well settled. As was observed by the Supreme Court in *Gopalan v. State of Madras*, (1) what we have to see is whether the omission of the impugned portions of the Act will 'change the nature or the structure or the object of the legislation'. In the words of MAHAJAN, J. in *State of Bihar v. Kameshwar Singh* (2):

"The real question to decide in all such cases is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive, or, it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted at all that which survives without enacting the part that is *ultra vires*."

The above observations would *mutatis mutandis* apply with full force in the present case. The present Act, viz. the U. P. Zamindars' Debt Reduction Act is a legislation intended primarily for the benefit of the debtors. The general provision of the definition relates to it. This general provision is followed by a number of exceptions which are discriminatory and are severable

(1) A.I.R. 1960 S. C. 27.

(2) A.I.R. 1962 S.C. 282 at p. 277.

from the rest. There is no reason why the principle laid down in this case should not be applicable to the present one. In a subsequent portion of the judgment it is observed:

"Applying these principles to the provisions of the impugned statute, we find that the dominant motive of the legislature in placing the Act on the statute book was to raise revenue, more particularly because, in the Act, the charging section is general in its scope.

A secondary and subordinate intention also appears, namely, that certain specified persons or institutions and such other persons as may be notified by the Government be exempted from taxation but the two portions of the Act are not so interdependent that it could be said that if the exemptions are eliminated, the legislature would still have not passed the main enactment.

We think that the exempted clauses can be separated from the rest of the Act which can be given effect to and all that will happen will be merely that a few exempted persons would be liable to pay the tax."

in the present case also, bearing in mind the dominant purpose of the legislature, the exemptions relate merely to secondary matters and incorporate what is described in the above passage as a subordinate intention. The exempted persons form, as pointed out above, a sub-class within a class. Their elimination, therefore, would leave the valid portion of the Act unaffected. With the disappearance of the sub-class the persons falling under the exempted category will naturally come under the general class.

Connected with the above argument of the learned Advocate-General was another general argument that the doctrine of severability can be invoked only in cases where invalidity arises out of want of legislative

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competence, and not in cases where it arises out of violation of constitutional prohibitions as in the present case. This argument was advanced before the Supreme Court in the case of *R. M. D. Chamarbaugwalla v. Union of India* (1). The Supreme Court strongly repelled this contention in the following words:

"When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provision contravening constitutional prohibitions."

No other argument was advanced before us.

The net result of the above discussion is that the two questions formulated by us in the earlier portion of this judgment should be answered as follows:

(1) Sub-cl. (vi) of cl. (f) of s. 2 of the U. P. Zamindars' Debt Reduction Act is invalid being violative of Art. 14 of the Constitution of India.

(2) The invalid portion, however, is severable from the valid portion with the result that the definition of "debt" contained in the main portion of cl. (f) remains alive so as to make the Act itself enforceable irrespective of the fact that the invalid portion becomes inoperative.

The plea of the appellants judgment-debtors, therefore, prevails, and they would be fully entitled to all the benefits afforded to debtors under the U. P. Zamindars' Debt Reduction Act, 1953. As a result of this finding this case will have to be remanded.

We, accordingly, allow this appeal, set aside the judgment and decree of the trial Court. We further order that this case shall be remanded to the trial Court for a re-determination of the amount due to the plaintiff-respondent after giving the defendants-appellants the benefits to which they are entitled under the U. P. Zamindars' Debt Reduction Act, 1953. The appellants will be entitled to their costs from the respondent. H.C.

(1) A.I.R. 1957 S. C. 628.

Appeal allowed.